UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3883.

MARIO MERCADO E HIJOS,

PLAINTIFF, APPELLANT,

v.

ELVIRA OLIVIERI COMMINS ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO,
FROM JUDGMENT, JULY 31, 1942.

TRANSCRIPT OF RECORD.

WILLIAM CATTRÓN RIGBY,
FRED W. LLEWELLYN,
PEDRO M. PORRATA,
for Appellant.
JOSE SABATER,
for ELVIRA OLIVIERI COMMINS, *Appellee.*
LEOPOLDO TORMES,
LUIS LOPEZ DE VICTORIA,
for LLUBERAS PASSARELL ET AL., *Appellees.*

BOSTON:
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1943

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3883.

MARIO MERCADO E HIJOS,
PLAINTIFF, APPELLANT,
v.
ELVIRA OLIVIERI COMMINS ET AL.,
DEFENDANTS, APPELLEES.

IN THE SUPREME COURT OF PUERTO RICO.

TRANSCRIPT OF RECORD.

[FILED IN CIRCUIT COURT OF APPEALS MARCH 26, 1943.]

IN THE DISTRICT COURT FOR THE JUDICIAL DISTRICT OF PONCE, PUERTO RICO.

CIVIL CASE NO. 311.

MARIO MERCADO E HIJOS, Plaintiff,
v.
ELVIRA OLIVIERI COMMINS, MANUEL FRANCISCO LLUBERAS PASSARELL and his wife HAZELL KELLY LLUBERAS, ANTONIA LLUBERAS PASSARELL, ROSA ELENA LLUBERAS PASSARELL, GRACIELA LLUBERAS PASSARELL and her husband ANTONIO VALENTI MAESTRE, CELIA LLUBERAS PASSARELL and her husband EMILIO BLASINI TOTTI, and RAQUEL LLUBERAS PASSARELL, Defendants.

In re: RESCISSION OF SALE AND OTHER PARTICULARS.

COMPLAINT.

[Filed April 8, 1937.]

To the Honorable Court:

Now comes the plaintiff herein through its undersigned counsel before this Honorable Court and as its cause of action respectively alleges:

1. That the plaintiff, "Mario Mercado e Hijos", is an agricultural civil partnership with its domicile in Ponce, Puerto Rico.

2. That the defendants are all of them above 21 years of age and domiciled as follows: Elvira Olivieri Commins in Mayaguez, Puerto Rico; Manuel Francisco Lluberas Passarell and his wife Hazell Kelly Lluberas and Antonia Lluberas Passarell in Yauco; Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valenti Maestre, and Raquel Lluberas Passarell in the City of New York, United States of America, and Celia Lluberas Passarell and her husband Emilio Blassini Totti in Ponce, Puerto Rico.

3. That by public deed No. 13 executed on March 23, 1932, before notary Fernando Zapater Martinez, who acted in the place of notary Jose Tous Soto, recorded in the Registry of Property of Ponce, of which paper a literal copy is attached to this complaint and made part thereof, Mrs. Elvira Olivieri Commins executed and subscribed four promissory notes payable to holder by endorsement and dated March 23, 1932, the first three respectively in the sum of ten thousand dollars as principal, two thousand seven hundred dollars for interest thereon and five hundred dollars for costs, expenses, disbursements and attorney's fees, and the fourth in the sum of eleven thousand two hundred and fifty-six dollars and eighty-nine cents as principal, three thousand dollars for interest thereon and five hundred dollars for costs, disbursements and attorney's fees, all of which to mature on March 23, 1939.

4. That in order to secure the above four promissory notes, defendant Mrs. Elvira Olivieri Commins by said deed No. 13 of

March 23, 1932, executed before notary Mr. Fernando Zapater Martinez, who acted in the place of notary Jose Tous Soto, executed a voluntary mortgage on her undivided joint half interests in the following estate:

"NUMBER ONE: A piece of rural property known as Juanita lying in the Pueblo and Quebrada barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the Rufina plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said Rufina plantation; on the west by land of the San Rafael plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to Piedras Blancas barrio, and on the opposite side by land of Antonio Llabres." Said estate is crossed by part of the railroad track.

"NUMBER TWO: A piece of rural property known as Los Indios lying in the Indios barrio within the municipal district of Guayanilla with an area of 430 cuerdas equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado, now, Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of

Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Company and by mangroves of the maritime zone; on the south by the Yauco river and by land of Mercedes plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez."

5. That in the third paragraph of the body of the said deed, Mrs. Elvira Olivieri Commins acknowledged to be indebted to the partnership Mario Mercado e Hijos in the sum of $41,256.89 arising from a liquidated current account at the time of the execution of the aforesaid deed, and in payment of which defendant Mrs. Elvira Olivieri Commins endorsed and delivered to the partnership Mario Mercado e Hijos the four mortgage notes mentioned in paragraph 3 of the complaint and received and accepted by the latter.

6. That defendant Mrs. Elvira Olivieri Commins and the partnership Mario Mercado e Hijos, by means of said deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, who acted in the place of notary Jose Tous Soto, and as stated on its seventh and eleventh clauses, literally agreed the following:

"SEVENTH: OPTION TO PURCHASE AND SELL AND TO LEASE.—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in

violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

"ELEVENTH: The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force."

7. That by public deed No. 23 of May 9, 1933, executed before the aforesaid notary Fernando Zapater, the partnership Mario Mercado e Hijos conveyed to the Heirs of Jose Tous Soto, made up of Belen Gonzalez de Tous, Belen Maria, Gladys, Jorge, Hector, Jose, Luz-Belen, Ana-Rosa, Celia and Alicia Tous y Gonzalez, the amount of the aforesaid mortgage credit of $41,256.89, and interest thereon not yet accrued, through the proper endorsement and delivery by the plaintiff to the aforesaid heirs of the four mortgage credits hereinbefore described.

8. That at the time of the said conveyance of the four mortgage credits above mentioned to the Heirs of Jose Tous Soto, plaintiff Mario Mercado e Hijos stipulated with said heirs to reserve and it did reserve to itself the right of option to sell and repurchase as agreed upon by defendant Elvira Olivieri Commins and the plaintiff, pursuant to clause 7 hereinbefore transcribed of said deed No. 13 of March 23, 1932, before notary Fernando Zapater Martinez, as substitute of Jose Tous Soto.

9. That by public deed No. 33 of August 20, 1936, executed before notary Tomas Paz Ruiz, recorded in the Registry of Property of Ponce, defendant Elvira Olivieri Commins and her sister Santia Olivieri Commins, as the sole joint owners, proceeded to the actual partition of the estates described in paragraph 4 of this complaint, there being alloted to said defendant Elvira Olivieri Commins, in satisfaction of her undivided joint interests in

the said estates the parcels of land and condominiums described as follows:

ONE: The whole estate known as Juanita described in No. 1 of the fourth averment of this complaint, with an area of 81.77 cuerdas of flat land and 378.91 cuerdas of hilly land.

TWO: Full ownership of a rural estate—a parcel of land containing 79.46 cuerdas, equivalent to 31 hectares, 23 ares, 8 centiares, 79 miliares, lying in the Indios barrio within the municipal district of Guayanilla, which are subdivided in the following five parcels, which, according to the plat of the survey made by engineer Juan Herminio Sanchez Diaz on December 5, 1935, are marked as follows:—Parcel "A" with an area of 41.26 cuerdas known by the name of Cupey of flat land planted to sugar canes; Parcel "B" containing 4 cuerdas, of flat land, planted to sugar canes; Parcel "C" having 20.52 cuerdas of semi-flat land at present planted to lesser crops; Parcel "D" containing 1.78 of semiflat land planted to lesser crops; and Parcel "E" containing 12 cuerdas of semiflat land planted to lesser crops. The whole tract is bounded as follows: on the north by land of Santia Olivieri, the track of the American Railroad Company and from the west angle of Parcel "D" by the municipal road leading from Guayanilla to the Boca barrio; on the south by land of Arturo Lluberas and nephews, by the Yauco river, by a 0.30-cuerda undivided parcel containing the pump and belonging to Santia and Elvira Olivieri Commins, and with land of Santia Olivieri; on the east by land of Santia Olivieri, and on the west by land of Mariano Lugo, by land of Ramon Ramirez, and by an old road which divided land of Ramon Lluberas, Luis Cervoni, Dolores Lopez and land of Luis Cervoni and on the southwest land of Arturo Lluberas and nephews. The fact is recorded that all along the estate there is a private road belonging to

Santia and Elvira Olivieri, 6-meter wide, which proceeds along the west side of Parcel "B" as far as the undivided 0.30-cuerda parcel where the irrigation pump stands. Within this tract, but enclosed by said Parcel "C" there is a small parcel of land jointly owned by Santia and Elvira Olivieri with an area of 0.25 cuerda and there is built thereon a small house with a concrete foundation for a pump. And it is hereby explained that the aforesaid parcels marked letters "E" and "D" are separated, the former, partly on its east side, by the road leading from Guayanilla to Boca barrio and the latter by the railroad track, both in connection with Parcel "C", and the former is also separated in connection with the latter by the said railroad track. (*sic*)

THREE: Full ownership of a portion or parcel of saltpeter land lying in the Indios barrio of the municipal district of Guayanilla and bounded: on the north by land of Mario Mercado e Hijos; on the south with a cano within the land of Santia Olivieri; on the east by the Caribbean Sea and on the west by a 6-meter wide road, three meters of which is part of this parcel and the other three meters part of the parcel of land belonging to Santia Olivieri. Its area is 41.99 cuerdas, equivalent to 16 hectares, 50 ares, 37 centiares and 7 miliares of saltpeter land.

FOUR: A $50.00 Undivided Half Interest in the following $100.00-worth parcel and a $175.00-worth interest in the value of the pump standing on said parcel, which pump was appraised at $700.00, described as follows: "Undivided parcel of land with an area of 0.30 cuerda, equivalent to 11 ares, 79 centiares and 12 miliares with a small house thereon fenced and roofed with galvanized-iron, with a steam pump with every accessory and pipes for pumping water from the Yauco river for the irrigation of the estates belonging to Santia and Elvira Olivieri, situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north by land belonging to Elvira Olivieri Commins;

on the south by the Yauco river; on the east by land belonging to Santia Olivieri Commins and on the west by land belonging to Elvira Olivieri Commins."

FIVE: A $50.00 undivided half interest in the following $100.00-worth parcel: Rural: an undivided parcel of land measuring 0.25 cuerda, equivalent to 9 ares, 82 centiares and 60 miliares, possibly destined to have installed thereon a pump for drawing water from adjacent springs, with a cement foundation with a small house roofed and fenced with galvanized iron, and pipes. This parcel of land is situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north, west and east by parcel "C" of the estate belonging to Elvira Olivieri Commins; and on the south by parcel "A" known as Cupey from the same estate of Elvira Olivieri Commins.

10. That in the said deed of partition of jointly owned property, mentioned in the foregoing paragraph, there appeared plaintiff Mario Mercado e Hijos and gave its consent to the said partition of jointly owned property.

11. That prior to March 8, 1937, and on the best information and belief of plaintiff, the aforesaid defendant Elvira Olivieri Commins, as vendor, and the other defendants, as purchasers, while the option clause inserted in the mortgage deed of March 23, 1932, mentioned in paragraph 3 of this complaint was in force, conspired among themselves with the deliberate purpose of defrauding the plaintiff partnership Mario Mercado e Hijos of its right to exercise the right of redemption as agreed in clause 7 of the aforesaid deed No. 13 dated March 23, 1932, executed before notary Fernando Zapater Martinez acting in the place of Jose Tous Soto, entered into a contract of sale of the estates and condominiums already described in paragraph 9 of this complaint, and marked with the numbers 2, 3, 4 and 5, the purchase price being $40,000, all the defendants having notice of the right of option held by plaintiff Mario Mercado e Hijos at the time of such sale in regard to said holdings.

12. That on the day following, that is, March 9, 1937, said defendant Elvira Olivieri Commins, as vendor, and the other defendants, as purchasers, embodied in a public deed executed before notary Luis Lopez de Victoria the contract of sale entered into between them, and to which mention has already been made, said deed of sale having been presented for record in the Registry of Property of Ponce on March 10, 1937, and recorded on March 23, 1937.

13. That neither defendant Elvira Olivieri Commins, nor any of the other defendants, nor anybody else in their behalf advised plaintiff Mario Mercado e Hijos prior to the time when the former agreed upon and executed the said contract of sale of the estates and condominiums already described, or subsequent to such sale by registered letter or in any other way, the offer to buy for $40,000 the said properties made to said defendant Elvira Olivieri Commins by the other defendants, the partnership Mario Mercado e Hijos being informed of the execution of such contract of sale on March 10, 1937, by defendant Manuel Francisco Lluberas.

14. That plaintiff, should it have been advised as to the said offer to buy prior to the execution of such sale, would have been ready, as it is now ready, to pay for the properties described under Nos. 2 and 3 of paragraph 9 of this complaint and for the condominiums described under Nos. 4 and 5 of said paragraph, the same purchase price paid by the defendants purchasers to the defendant vendor for the properties above described, to wit: $35,000 for the immovable described under No. 2; $1,000 for the parcel described in No. 3; and $2,000 for each of the condominiums described in Nos. 4 and 5 of said paragraph 9 of this complaint as well as all other necessary disbursements made by the defendants on account of such sale. Plaintiff alleges that it is ready to comply with each and everyone of the terms imposed on defendant purchasers by defendant vendor, by virtue and as the result of such contract of sale entered into between them in connection with the aforesaid holdings.

15. That plaintiff desires to exercise and does hereby exercise his right to subrogate itself to the place, degree and priority of defendant purchasers regarding the properties the subject matter of said contract of sale, pursuant to the aforesaid clause of option to buy set forth in paragraph 7 of the mortgage deed dated March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of notary Jose Tous Soto.

16. That on this day and in Civil Case No. entitled Mario Mercado e Hijos, plaintiff, *v.* Elvira Olivieri Commins, Manuel Francisco Lluberas Passarell, and his wife Hazell Kelly Lluberas, Antonio Lluberas Passarell, Rosa Elena Lluberas Passarell, Gracelia Lluberas Passarell and her husband Antonio Valenti Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti, and Raquel Lluberas Passarell, defendants, there has been deposited in the office of the clerk of this court the sum of $40,359.50, itemized as follows:

Amount of the purchase price paid by the defendants Lluberas Passarell to Elvira Olivieri Commins for the estates and condominiums mentioned in paragraph 9, under Nos. 2, 3, 4 and 5	$40,000.00
Amount disbursed for the deed of sale	200.00
Internal revenue stamps for the copy	20.00
Recording thereof in the registry of property	89.50
Necessary disbursements and unknown to plaintiff that may have been incurred by defendants	50.00
	$40,359.50

17. That the plaintiff hereby reproduces and makes part of this complaint all the allegations set forth in the complaint in the said Civil Case No. 310, offering and placing at the disposal of the defendants the sum of $40,359.50 deposited in said civil action in legal tender of the United States of America and for the accounts set forth in the petition in question.

By virtue whereof, plaintiff Mario Mercado e Hijos respectfully

prays this Honorable Court to render a judgment, at the proper time and after the proper legal procedure, with the following pronouncements:

(a) To decree the rescission of the contract of sale dated March 9, 1937, executed before notary Luis Lopez de Victoria.

(b) To decree the subrogation of the partnership Mario Mercado e Hijos to the rights of the defendant purchasers of holdings 2, 3, 4 and 5 hereinbefore described in paragraph 9 of this complaint, ordering the latter to execute in favor of plaintiff the proper deed of sale thereof, and in case of refusal on the part of the latter, upon the judgment becoming final that the marshal of this Honorable Court executes such contract of sale.

(c) To grant to the plaintiff any other remedy congruent with the averments of this complaint and any evidence submitted at the proper time, all of which in accordance with law, and

(d) To adjudge the defendants to pay any costs that might be incurred by the plaintiff by reason of the present action, including attorney's fees.

Ponce, Puerto Rico, April 7, 1937.

PEDRO M. PORRATA,
FELIX OCHOTECO, JR.,
by FELIX OCHOTECO, Jr.,
Counsel for Plaintiff.

OATH.

I, Mario Mercado Riera, duly sworn, hereby declare: that the above is my name, that I am of age, married, a resident of Ponce, Puerto Rico; that I am assistant-manager partner of plaintiff Mario Mercado e Hijos, an agricultural civil partnership, domiciled in Ponce, Puerto Rico. That each and every one of the facts alleged in the present complaint are known to me personally and the same are true except those alleged in paragraph 11 of said complaint which I believe to be true on information and belief.

Ponce, Puerto Rico, April 7, 1937.

MARIO MERCADO, Jr., *Affiant.*

Affidavit No. 13782.

Sworn to and subscribed before me by Mario Mercado Riera, of age, married, assistant-manager and partner of the agricultural civil partnership Mario Mercado e Hijos, whom I know personally.

Ponce, Puerto Rico, April 7, 1937.

R. ATILES MOREU,
Notary Public.

(There is affixed hereto and cancelled a $0.25 Internal Revenue stamp and another $5.00 Internal Revenue stamp and a $1.00 Bar Association stamp.)

(There was attached to the foregoing complaint an uncertified copy of deed No. 13, dated March 23, 1932, executed in Mayaguez, Puerto Rico before notary Fernando Zapater Martinez, which deed was accepted in evidence and marked Exhibit J of plaintiff which copy is literally transcribed on pages 322 to 330 of the transcript of the documentary evidence.)

(NOTE: Likewise there was attached to the complaint above transcribed a copy of the complaint *In re:* Deposit of money in court in Civil Case No. 310 of this court, entitled Mario Mercado e Hijos, plaintiff, *v.* Elvira Olivieri Commins, Manuel Francisco Lluberas Passarell and his wife Hazell Kelly Lluberas, Antonia Lluberas Passarell, Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valenti Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti, and Raquel Lluberas Passarell, defendants, which complaint was submitted and admitted in evidence and marked Exhibit L of the plaintiff, which is transcribed on pages 348 to 359 of the documentary evidence.)

[Same Title.]

DEMURRER.

To the Court:

Now come defendants Manuel Francisco Lluberas Passarell and his wife Hazell Kelly Lluberas, Antonia and Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valenti Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti and Raquel Lluberas Passarell, through their undersigned attorney and interpose the following demurrer to the complaint of the plaintiff:

That the complaint fails to state facts sufficient to constitute a cause of action (subdivision 6 of section 105 of the Code of Civil Procedure).

PRAYER.

For the above reasons they pray the court to dismiss the complaint in every respect, with costs on the plaintiff.

Yauco (for filing in Ponce), April 14, 1937.

Respectfully,

LUIS LOPEZ DE VICTORIA,
Attorney for the above-mentioned Defendants.

CERTIFICATE OF SERVICE OF NOTICE.

I, Luis Lopez de Victoria, do hereby certify:

That I am the attorney for defendants Manuel Francisco Lluberas Passarell and his wife Hazell Kells [*sic*] Lluberas, Antonia and Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valentin [*sic*] Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti and Raquel Lluberas Passarell.

That I served a copy of the foregoing demurrer on counsel for plaintiff, attorney Felix Ochoteco, Jr., and attorney Pedro M. Porrata, as follows: I mailed to each of them from the post-office of Yauco and enclosed in envelopes properly closed, with

the required postage, registered and addressed respectively to attorney Felix Ochoteco, Jr., Ochoa Building, San Juan, Puerto Rico, and attorney Pedro M. Porrata, Ponce, Puerto Rico, true and faithful copies of said demurrer with true and faithful copy of this return signed by me. Between Yauco, where I have my domicile and office and San Juan and Ponce respectively where attorneys Felix Ochoteco, Jr., and Pedro M. Porrata are respectively domiciled and have their offices, there is a federal regular and daily mail service.

Yauco, Puerto Rico, April 14, 1937.

LUIS LOPEZ DE VICTORIA,
Attorney for the above-mentioned Defendants.

(There are affixed hereto and cancelled a $5.00 Internal Revenue stamp and the Bar Association stamp. Likewise there is on the margin of the first folio a handwritten note reading as follows: "The parties have been notified to appear on April 26/37 this 15th of April, 1937. Filed April 15/37.")

[Same Title.]

MOTION FOR SETTING DEMURRER FOR HEARING.

To the Clerk of the Court:

Now come defendants Manuel Francisco Lluberas Passarell and his wife Hazell Kells [*sic*] Lluberas, Antonia and Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valentin [*sic*] Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti and Raquel Lluberas Passarell, through their undersigned attorney and move that the demurrer interposed by these defendants to the complaint herein be set for argument upon the special calendar of this court on Monday, April 26, 1937, at 9:00 A.M.

Yauco, Puerto Rico, April 14, 1937.

LUIS LOPEZ DE VICTORIA,
Attorney for the above-Defendants.

(There is affixed hereto and cancelled a $5.00 Internal Revenue stamp.)

CERTIFICATE OF SERVICE OF NOTICE.

I, Luis Lopez de Victoria, do hereby certify:

That I am the attorney for defendants in the present action Manuel Francisco Lluberas Passarell and his wife Hazell Kells [*sic*] Lluberas, Antonia and Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valentin [*sic*] Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti and Raquel Lluberas Passarell.

That I served a copy of the foregoing motion for setting demurrer for hearing on the attorneys for plaintiff, Felix Ochoteco, Jr., and Pedro M. Porrata, as follows: I forwarded to each of them by mail from the Yauco post-office enclosed in several envelopes duly sealed, postage paid, registered and respectively addressed as follows: attorney Felix Ochoteco, Jr., Ochoa Building, San Juan, Puerto Rico, and attorney Pedro M. Porrata, Ponce, Puerto Rico, with several true and faithful copies of the present return signed by me. Between Yauco where I am domiciled and have my law office, and San Juan and Ponce, where attorneys Felix Ochoteco, Jr., and Pedro M. Porrata are respectively domiciled and have their law offices, there is a federal, regular daily mail service.

Yauco, Puerto Rico, April 14, 1937.

LUIS LOPEZ DE VICTORIA,
Attorney for the above Defendants.

[Same Title.]

DEMURRER.

Now comes Elvira Olivieri Commins, a defendant herein, through her attorney Jose Sabater and demurrs to the complaint of the plaintiff on the following ground:

That the complaint fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

Therefore: This defendant prays the court to sustain this demurrer and to dismiss the complaint herein and to render judgment against the plaintiff and in favor of this defendant, with costs, expenses, disbursements and attorney's fees on the plaintiff.

Mayaguez (for filing in Ponce), April 14, 1937.

JOSE SABATER,
Counsel for Defendant, ELVIRA OLIVIERI COMMINS.

I do hereby certify: That on this day, April 14, 1937, I mailed with the required postage to attorney Pedro M. Porrata and attorney Felix Ochoteco, Jr., plaintiff's counsel, at their domicile in San Juan, Puerto Rico, with their offices in the Ochoa Building, a true and faithful copy of the foregoing demurrer and likewise on April 14, 1937, I mailed with the required postage to attorney Luis Lopez de Victoria, counsel for the defendant, at his residence in Yauco, Puerto Rico, a true and faithful copy of the foregoing demurrer; and stating that between this city of Mayaguez, where the undersigned attorney has his domicile and the cities of San Juan and Yauco, there is a regular mail service.

JOSE SABATER,
Counsel for Defendant, ELVIRA OLIVIERI COMMINS.

(There is affixed hereto and cancelled a $5.00 Internal Revenue stamp as well as a Bar Association stamp.)

[Same Title.]

MOTION ON STIPULATION.

Now comes Elvira Olivieri Commins, defendant herein, through her undersigned attorney Jose Sabater and respectfully states:

1. That there has been set for next Monday the 26th instant, on the special calendar, the hearing of the demurrer interposed by this defendant to the complaint herein; but inasmuch as attorney Felix Ochoteco, Jr., one of the attorneys for the plaintiff, has suggested to the undersigned attorney that said demurrer be argued

by briefs, this attorney to file his brief within ten days from the 26th instant, and the attorney for the plaintiff to submit his brief within ten days from the notice of the brief of this attorney.

2. That this attorney has accepted the above proposition and has been informed that attorney Luis Lopez de Victoria, counsel for the other defendants, has also accepted the proposition and has so informed attorney Felix Ochoteco, Jr., by wire, with the request that the stipulation be submitted in writing; and inasmuch that said stipulation has not yet reached this attorney and in order that this case should be not unnecessarily delayed;

Therefore: This defendant prays this Honorable Court to approve the said stipulation and to direct that instead of oral argument at the hearing set for the 26th instant, *In re:* the demurrer, the same be submitted on briefs in the manner set forth.

Mayaguez (for filing in Ponce), April 24, 1937.

JOSE SABATER,
Counsel for Defendant, ELVIRA OLIVIERI COMMINS.

I hereby certify: That on this day, April 24, 1937, I forwarded by mail with the required postage to Felix Ochoteco, Jr., attorney for plaintiff, at his domicile in San Juan, Puerto Rico, and to Luis Lopez de Victoria, attorney for co-defendants, at his domicile in Yauco, Puerto Rico, a true and faithful copy of the foregoing motion regarding stipulation. I want to state that between this city of Mayaguez, where the undersigned attorney has his domicile, and the cities of San Juan and Yauco there is a regular mail service.

JOSE SABATER,
Attorney for Defendant, ELVIRA OLIVIERI COMMINS.

[Same Title.]

MOTION.

Now come the Lluberas co-defendants through their undersigned attorneys and state:

That argument on the demurrer to the complaint is set for April 26, 1937, at 9:00 A.M.

That Felix Ochoteco, Jr., attorney for plaintiff, has suggested by wire to this party to argue said demurrer by means of briefs, this attorney to be allowed ten days for filing briefs and the plaintiff's attorneys ten days for answering, which proposal has been accepted. The wire from attorney Felix Ochoteco, Jr., is hereby enclosed.

Wherefore we pray the court that in said oral argument upon the demurrer there should be accepted from us a brief in support thereof which we will file within ten days counted from April 26, 1937, and that the same shall be answered by the plaintiff within ten days from the service of copy of said brief.

Yauco (for filing in Ponce), April 24, 1937.

Respectfully submitted,

LUIS LOPEZ DE VICTORIA,
Attorney for the LLUBERAS, *Defendants.*

I, Luis Lopez de Victoria, do hereby certify:

That I served copies of this motion today by mail, forwarding several true and faithful copies of said motion and of the present return in envelopes properly sealed, with postage paid, and addressed to attorneys for the plaintiff, Felix Ochoteco, Jr., and Pedro M. Porrata, at their respective postal addresses in San Juan and Ponce, and to the attorney for co-defendant Elvira Olivieri Commins, Jose Sabater, at his postal address in Mayaguez, Puerto Rico.

Yauco, Puerto Rico, April 24, 1937.

LUIS LOPEZ DE VICTORIA,
Attorney for the LLUBERAS, *co-Defendants.*

[Same Title.]

MINUTES OF APRIL 26, 1937.

The demurrers to the complaint herein having been called for hearing and the same having been submitted by means of briefs, in compliance with a wire from Felix Ochoteco, Jr., attorney for the plaintiff, the court grants the parties ten days each for filing said briefs, priority in filing briefs corresponding to the parties filing the demurrer.

(From Minutes Book No. 32, First Section, session of April 26, 1937, presided by Judge D. Sepulveda. I hereby certify: That a copy of the foregoing order has been forwarded to attorneys Pedro M. Porrata, Ponce, attorney Felix Ochoteco, Jr., San Juan, attorney Luis Lopez de Victoria in Yauco, and attorney Jose Sabater, Mayaguez, on even date.)

I attest: E. GOTAY PURCELL, *Clerk*.

[Same Title.]

ORDER.

In the instant case all the defendants, through their respective counsel, filed a demurrer to the complaint in which they alleged that said complaint failed to state facts sufficient to constitute a cause of action. (Subdivision 6 of Section 105 of the Code of Civil Procedure.)

Upon stipulation of all the parties said demurrer was submitted on briefs to the court for consideration.

Four very elaborate and interesting briefs were submitted, the latter of which having been filed on July 2, 1937.

The delay in the determination of the legal questions submitted was due to the following causes: the undersigned judge was engaged from August 1 to September 10 in the trial and determination of civil and criminal cases; that from September 13 to December 6 he presided the trial by jury for the murder of

detective Ceferino Loyola and that from that time until now he has been engaged in the trial and determination of civil and criminal cases. During July the judge was on vacation.

The legal questions involved having been discussed from every imaginable argument in the briefs which contain innumerable citations of codes, legal doctrines and decisions which the judge has had to study outside office hours.

The court, after careful consideration of the complaint herein and the briefs filed, reaches the conclusion that the complaint, admitting as true the allegations therein, states facts sufficient to constitute a cause of action in favor of the plaintiff and against all of the defendants.

The court hereby overrules the demurrer for insufficiency interposed by the defendants to the complaint.

The defendants are granted ten days for filing their answer to the complaint.

Ponce, Puerto Rico, March 25, 1938.

D. SEPULVEDA,
District Judge.

SERVICE OF NOTICE.

To Attorneys FELIX OCHOTECO, San Juan, LUIS LOPEZ DE VICTORIA, Yauco, JOSE SABATER, Mayaguez, P. R.:

You are hereby served with notice of the foregoing order of even date made by this court.

I hereby certify: That I have today attached to the record in the instant case the original copy of the present service of notice.

Ponce, Puerto Rico, March 25, 1938.

E. GOTAY PURCELL, *Clerk.*

[Same Title.]

ANSWER.

Now come defendants Manuel Francisco Lluberas Passarell and his wife Hazel Kells [*sic*] Lluberas, Antonia Lluberas Passarell, Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valenti Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti and Raquel Lluberas Passarell, who hereinafter shall be called co-defendants "Lluberas Passarell" and through their undersigned attorney answer the complaint herein and allege:

First. They admit the first paragraph of the complaint.

Second. They admit the second paragraph of the complaint.

Third. They admit the third paragraph of the complaint.

Fourth. They admit the fourth paragraph of the complaint.

Fifth. They admit the fifth paragraph of the complaint.

Sixth. Of the sixth paragraph of the complaint co-defendants Lluberas Passarell admit that in deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of notary Jose Tous Soto and whereby Elvira Olivieri Commins mortgaged to plaintiff the estates described in the fourth paragraph of the complaint, there was inserted in clause 7 thereof the agreement literally transcribed in the sixth paragraph of the complaint which we now answer.

Seventh. They admit the seventh paragraph of the complaint.

Eighth. As regards the eighth paragraph of the complaint co-defendants Lluberas Passarell deny on information and belief that in the conveyance of the mortgage credit by the plaintiff to the heirs of Jose Tous Soto, Mario Mercado e Hijos agreed with the aforesaid heirs to reserve to itself the right of purchase and redemption referred to in the sixth paragraph of the complaint; and they on the contrary allege that in making the said conveyance and in the deed whereby the same was made no reservation whatever was set forth as regards the said conveyance and that

neither was Elvira Olivieri Commins, when notified of such conveyance, informed that Mario Mercado e Hijos had reserved to itself such right of purchase and redemption, it having been set forth in the deed of conveyance of the said mortgage credit (which is deed No. 33, executed in Ponce, Puerto Rico, on May 9, 1933, before notary Fernando Zapater Martinez) that the assignor subrogated the assignee to its place in the same degree and priority.

Ninth. They admit the ninth paragraph of the complaint.

Tenth. They admit the tenth paragraph of the complaint.

Eleventh. As regards the eleventh paragraph of the complaint these co-defendants deny that prior to March 8, 1937, co-defendant Elvira Olivieri Commins and co-defendants Lluberas Passarell, during the life of the option clause contained in the mortgage deed of March 23, 1932, mentioned in paragraph 3 of the complaint, conspired among themselves and with the deliberate purpose of defrauding the plaintiff of its right of redemption agreed upon in clause 7 of the said mortgage deed executed before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, deed No. 13 of March 23, 1932, entered into a contract of sale of the estates and condominiums described in the ninth paragraph of the complaint, under Nos. 2, 3, 4 and 5; alleging on the contrary that the sale of said immovables was executed on March 9, 1937, according to deed No. 40, executed in Mayaguez, on March 9, 1937, before notary Luis Lopez de Victoria, when the aforesaid mortgage credit had already been duly and fully paid, judicial authorization therefore having been first obtained from the District Court of Ponce as per deed No. 47, executed in Ponce before notary Fernando Zapater Martinez on March 8, 1937.

Twelfth. Concerning the twelfth paragraph of the complaint these co-defendants deny that on March 9, 1937, Elvira Olivieri Commins and co-defendants Lluberas Passarell embodied in a public deed any contract of sale executed before the cancellation

of the aforesaid mortgage, and alleging on the contrary that the said sale was executed on March 9, 1937.

Thirteenth. They admit paragraph 13 of the complaint.

Fourteenth. In opposition to paragraph 14 of the complaint these co-defendants allege on information which they believe to be true: that before Elvira Olivieri Commins sold the estates sued upon to these co-defendants, she attempted to sell them to the plaintiff and the latter attempted to purchase them; but the prices offered by the plaintiff to Elvira Olivieri Commins were so low that the latter refused to accept them.

Fifteenth. As regards the fifteenth paragraph of the complaint these co-defendants admit that the plaintiff wishes to exercise the right to subrogate itself to the right, degree and priority of the purchasers concerning the estates involved in the aforesaid contract of purchase; but they deny that the plaintiff is entitled to exercise the same, on the ground that the agreement on which they pretend to base such right is void; and because the aforesaid sale took place after the full cancellation of the mortgage in consideration of which such right of redemption was agreed upon.

Sixteenth. They admit the sixteenth paragraph of the complaint.

Seventeenth. In answer to the seventeenth paragraph of the complaint co-defendants Lluberas Passarell, reproduce and make part of the present answer all the challenges and allegations of fact and of law which these co-defendants have made or may make in the future to the allegations of the plaintiff as set forth in the complaint in civil case No. 310 of this court in regard to deposit in court between these same parties.

NEW MATTERS OF DEFENSE.

As new matters of defenses we allege as follows:

(1) That the option to purchase and lease stipulated in the seventh clause of mortgage deed No. 13 of March 23, 1932, executed before notary Fernando Zapater, acting in the place of notary Jose Tous Soto, which clause seven is transcribed in the

sixth paragraph of the complaint, is void for the following reasons:

(A) Because the same amounts to an agreement whereby the mortgagee is empowered to adjudicate to itself the mortgagor's property by reason of the nonperformance of the contract secured by mortgage (Sections 2 and 4 of Act No. 47 of April 13, 1916 to repress usury).

(B) Because the same amounts to an agreement whereby the mortgagor is precluded from alienating or freely disposing of her property (subdivision 4 of Section 107 of the Mortgage Law; *Van Syckel* v. *The Registrar of Property*, 3 P.R.R. 9; and *Clausells* v. *Registrar of Property*, 20 P.R.R. 298).

(C) Because it conflicts with Section 1412 of the Civil Code.

(D) Because it tends to create a right that cannot be created, that is, a right of redemption to be enforced by someone who was not the vendor of the property but a mortgagee against a lessee.

(2) Should said clause 7 of deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of notary Jose Tous Soto, be valid, the right of redemption would be extinguished and prescribed by reason of the lapse of more than four years after the same had been granted (Sections 1397 and 1078 of the Civil Code).

(3) Should plaintiff be entitled to an action of conventional redemption against defendants Lluberas Passarell, the plaintiff has failed to comply with the legal provisions regarding the very essential particular of the deposit in court, because although it deposited such amount in court, it did it separately, that is, within a different proceeding, that is, civil case No. 310 of this court, instead of doing so within this same proceeding, case No. 311, for which reason such deposit in court is not legally binding in the present case.

PRAYER.

By virtue whereof they pray the Honorable Court to render in due course a judgment dismissing the complaint in every particular, taxing the costs against the plaintiff.

Yauco, Puerto Rico, April 20, 1938.

Respectfully,

LUIS LOPEZ DE VICTORIA,
Attorney for co-Defendants LLUBERAS PASSARELL.

OATH.

I, Manuel Francisco Lluberas Passarell, do solemnly swear:

That the above is my name and that I am more than twenty-one years old, married, property owner and a resident of Yauco, Puerto Rico, and that I am one of the co-defendants in the present action.

That I have read myself the facts alleged in the foregoing answer and find that all of them are true and personally known to me, except those which I believe true on information and belief and as such I swear to them.

Yauco, Puerto Rico, April 20, 1938.

M. FRANCISCO LLUBERAS, *Affiant.*

Affidavit No. 71.

Sworn to and subscribed before me by Manuel Francisco Lluberas Passarell whose personal characteristics are stated above, whom I personally know.

Yauco, Puerto Rico, April 20, 1938.

ANGEL PADRO,
Notary Public.

CERTIFICATE OF SERVICE OF NOTICE.

I, Luis Lopez de Victoria, do hereby certify:

That I am the attorney for co-defendants Lluberas Passarell in the present action.

That I served copy of the foregoing answer on counsel for

plaintiff, attorney Felix Ochoteco, Jr., and attorney Pedro M. Porrata as follows: I forwarded to each of them by mail from the post-office of Yauco and enclosed in various envelopes properly closed, with the required postage, registered and respectively addressed as follows: attorneys Felix Ochoteco, Jr., Ochoa Building, San Juan, Puerto Rico; and attorney Pedro M. Porrata, Ponce, Puerto Rico, several true and faithful copies of said answer with a true and faithful copy of this return signed by me. Between Yauco, where I have my domicile and office and San Juan and Ponce where attorneys Felix Ochoteco, Jr., and Pedro M. Porrata, respectively, reside and have their offices, there is a federal regular and daily mail service.

Yauco, Puerto Rico, April 22, 1938.

LUIS LOPEZ DE VICTORIA,
Attorney for co-Defendants LLUBERAS PASSARELL.

(There is cancelled a $0.25 stamp.)

[Same Title.]

ANSWER OF DEFENDANT ELVIRA OLIVIERI COMMINS.

Now comes defendant Elvira Olivieri Commins through her attorney Jose Sabater and in answer to the complaint herein alleges as follows:

FIRST. This defendant admits the averments of paragraphs 1, 2, 3, 4 and 5 of the complaint.

SECOND. This defendant admits that in mortgage deed No. 13 of March 23, 1932, executed before notary Fernando Zapater, acting in the place of notary Jose Tous Soto, there was stated clause seven which is transcribed in paragraph 6 of the complaint; but it is alleged by this defendant that said clause was inserted by said plaintiff in said mortgage deed without this defendant being aware of its scope and meaning, to which she was compelled to submit due to her status as debtor at the time of the execution of said deed; that at the time of the execution of such mortgage deed

and insertion of that clause, plaintiff Mario Mercado e Hijos was neither a co-owner of the mortgaged property nor a vendor thereof; that it was agreed between the plaintiff and this defendant that such agreement would be effective between the parties as long as the defendant was a mortgage debtor to Mario Mercado e Hijos and this defendant never consented to empower the plaintiff to appropriate to itself the property nor was it agreed or covenanted between the parties to forbid to defendant to dispose freely of her property.

THIRD. This defendant admits the contents of paragraph 7 of the complaint.

FOURTH. This defendant denies in its entirety paragraph 8 of the complaint and alleges on the contrary that when making the conveyance referred to in said paragraph and in the deed whereby the same was carried out no reservation was made as regards such agreement and when this defendant was notified of such conveyance of mortgage credit she was not advised nor acquainted with nor notified in legal form or otherwise that plaintiff Mario Mercado e Hijos had reserved to itself such right of option to sell and repurchase, it being stated in said deed of conveyance of the said mortgage credit—which is deed No. 33, executed in Ponce on May 9, 1933, before notary Fernando Zapater Martinez—that the grantor Mario Mercado e Hijos subrogated itself to the place of the grantee in the same degree and priority.

FIFTH. This defendant admits the contents of paragraph 9 of the complaint.

SIXTH. This defendant admits the allegations of paragraph 10 of the complaint.

SEVENTH. Regarding paragraph 11 of the complaint this defendant denies that on March 9, 1937, when this defendant sold the immovables referred to in such paragraph by deed No. 40, executed in Mayaguez, on the same 9th of March, 1937, before notary Lopez de Victoria, there was still in force the option clause inserted in the mortgage deed of March 23, 1932; and in opposition

to the averments of said paragraph she alleges that at that time the aforesaid mortgage credit had already been fully paid and cancelled, which payment and cancellation were effected pursuant to the judicial authorization from the District Court of Ponce, according to deed No. 47, executed in Ponce before notary Fernando Zapater Martinez on March 8, 1937.

Concerning said paragraph 11 of the complaint, this defendant denies to have conspired with the other defendants or with anybody else to defraud the plaintiff as to the agreement to repurchase referred to in said paragraph or for any other purpose or end; and this defendant further alleges in opposition to the allegations of said paragraph that when she sold to the other defendants, said option clause, which was forced by the plaintiff upon this defendant according to the mortgage deed of March 23, 1932, and that it was illegal and improper, was cancelled because this defendant had fully paid the mortgage credit and for that reason this defendant had ceased to be indebted to the plaintiff, this defendant disposing of said properties after having fully paid the mortgage in which the said option clause had been forced by the plaintiff upon the defendant.

EIGHTH. As regards paragraph 12 of the complaint, this defendant denies that on March 9, 1937, she and the other defendants embodied in a public deed executed before notary Luis Lopez de Victoria, the contract of sale entered into between them and alleges on the contrary that the said sale was entered into and perfected on March 9, 1937, by deed No. 40, executed in Mayaguez on the date above stated before the aforesaid notary when the mortgage credit constituted in favor of the plaintiff and conveyed by the latter to the heirs of Jose Tous Soto had already been fully paid and cancelled.

NINTH. Concerning paragraph 13 of the complaint this defendant admits that, having fully paid the mortgage credit referred to to the grantee thereof she failed to advise the plaintiff regarding the sale made by her to the other defendants, to which reference is made in said paragraph; and she denies for lack of

information and belief that the plaintiff partnership got information regarding the contract of sale on March 10, 1937, or at any other time.

TENTH: Regarding paragraph 14 of the complaint this defendant denies the hypothetical allegation that the plaintiff, should it have been advised of the proposal to purchase, would have been willing to pay for the properties and the condominiums the amount paid to this defendant by the defendant purchasers and this defendant further alleges that prior to the sale made to the other defendants by this defendant, during the life of the mortgage in which the option clause was imposed on this defendant, the plaintiff refused on several occasions to buy from the defendant on the ground that no other purchaser would be forthcoming and that when the mortgage credit became due it would compel this defendant to either sell or have the mortgage foreclosed.

ELEVENTH. As to paragraph 15 of the complaint this defendant denies that plaintiff is entitled to avail itself of the option to purchase set forth in the mortgage deed of March 23, 1932, executed before notary Fernando Zapater Martinez acting in the place of notary Jose Tous Soto, for the reason that this defendant had fully paid said mortgage and had fully cancelled the same and being, after the cancellation, at liberty to dispose freely of her property.

TWELFTH. Regarding paragraph 16 of the complaint this defendant admits that the deposit in court to which said paragraph refers was effected by the plaintiff in civil case No. 310 of this court, but she alleges that such deposit in court is legally ineffective because the same was not effected in this action.

THIRTEENTH. In answer to paragraph 17 of the complaint this defendant reproduces and makes part of the present answer all the denials and averments made by this defendant in this answer or that she may make in the future to the allegations of the plaintiff as set forth in the complaint in the said civil case No. 310 of this court regarding deposit in court between these same parties.

SPECIAL DEFENSE.

This defendant alleges that clause 7 of deed No. 13 of March 23, 1932, executed before notary Fernando Zapater y Martinez, acting in the place of notary Jose Tous Soto, was forced by the plaintiff upon the defendant while the latter was indebted to the plaintiff; that at the time said option to purchase and sell was inserted in the said mortgage deed, the plaintiff was not the vendor of the immovables but only a mortgagee; that plaintiff could not adjudicate to itself the property of this defendant in case of nonfulfillment of the contract secured by mortgage, nor could it prevent this defendant from disposing of, and alienating freely, said property, and that the option to repurchase or redeem was extinguished by the full payment by this defendant of the said mortgage credit and that the right of redemption was forfeited by plaintiff when conveying its mortgage credit to the Heirs of Jose Tous Soto and it moreover had prescribed because four years had elapsed from the time the same was granted. (Sections 1397 and 1078 of the Civil Code.)

Therefore: This defendant prays this Honorable Court to render a final judgment dismissing the complaint herein in all its parts and tax the costs, expenses and the fees of this defendant's attorney on the plaintiff.

JOSE SABATER,
Counsel for Defendant ELVIRA OLIVIERI COMMINS.

OATH.

Island of Puerto Rico,
Municipality of Yauco, ss.

Affidavit No.

I, Elvira Olivieri Commins, having been duly sworn, state: That I am one of the defendants in the present case; that I have read the foregoing answer drawn up by my attorney Jose Sabater whom I have authorized for the purpose and that I know the contents of such answer and state that the facts therein alleged are true and

known to me personally except as to those which I allege on information and belief which I also believe to be true.

ELVIRA OLIVIERI COMMINS.

Affidavit No. 73.

Sworn to and subscribed before me by Mrs. Elvira Olivieri Commins, of age, property owner, domiciled in Mayaguez, Puerto Rico, whom I personally know.

Yauco, Puerto Rico, April 21, 1938.

ANGEL PADRO,
Notary Public.

CERTIFICATE OF SERVICE OF NOTICE.

I hereby certify that on this the 21st of April, 1938, I forwarded by mail after paying the required postage to Felix Ochoteco, Jr., attorney for plaintiff at his domicile in San Juan, Puerto Rico, and to Luis Lopez de Victoria, attorney for the other defendant at his domicile in Yauco, Puerto Rico, a true and faithful copy of the foregoing answer respectively; and I hereby state that between this city of Mayaguez where the undersigned attorney has his domicile and the cities of San Juan and Yauco there is a regular mail service.

JOSE SABATER,
Attorney for Defendant Mrs. ELVIRA OLIVIERI COMMINS.

(There is a file seal duly affixed hereto to the effect that on April 22, 1938 and at 9:10 A.M. this paper was filed in the office of the clerk of this court.)

[Same Title.]

STATEMENT OF THE CASE AND OPINION OF DISTRICT COURT.

Due to the fact that the two above-entitled cases have been submitted on the same evidence and on the same briefs to the consideration and decision of this court and because in both cases the fundamental questions of fact and law are identical, we will decide them together in this opinion.

Case No. 311 refers to the rescission of a contract of purchase and sale and case No. 312 refers to the rescission of a contract of lease.

In the complaint in case No. 311 regarding the rescission of a contract of purchase and sale it is substantially alleged as follows:

That Mrs. Elvira Olivieri Commins executed four promissory notes to holder negotiable by indorsement, secured by a mortgage upon her undivided joint half interests in the estates Juanita and Indios which are bounded by land belonging to the plaintiff in the municipal district of Guayanilla.

That in the same deed in which was embodied the mortgage to secure the aforesaid promissory notes, Mrs. Elvira Olivieri Commins acknowledged to be indebted to plaintiff Mario Mercado e Hijos in the sum of $41,256.89 and that the latter agreed to accept such notes in payment of the aforesaid indebtedness. That it was further agreed as part consideration of the agreement to accept the payment with the mortgage notes of a debt payable in legal tender, that Elvira Olivieri Commins bound herself to grant the plaintiff priority for the purchase and lease of her condominiums on the same price and conditions so long as the mortgage was in force, and that in case of a sale in violation of such agreement, the plaintiff was empowered to prosecute the proper action of redemption.

That it was further agreed, pursuant to the eleventh clause of the said deed No. 13 of March 23, 1932, transcribed in the complaint in the above-entitled case, that the actual division of the condominiums in the tracts Juanita and Indios could not be effected without the consent of the partnership Mario Mercado e Hijos so long as the mortgage notes were in force.

It is further alleged in said complaint that plaintiff conveyed the amount of the mortgage notes to the Heirs of Jose Tous Soto and that it was agreed in said conveyance with the aforesaid heirs that the plaintiff partnership should reserve, and it did reserve to itself, the right of option and redemption referred to.

That the conveyance of the mortgage notes was carried out on.

May 9, 1933. That after the lapse of two years, three months and eleven days, that is, on August 21, 1936, defendant Mrs. Elvira Olivieri Commins and her sister Santia made the actual division of their condominiums in the mortgaged properties, and pursuant to said eleventh clause of the mortgage deed, the partnership Mario Mercado e Hijos appeared and gave its consent to the aforesaid act.

The preliminary facts having been thus established, it is further alleged in the complaint that said defendants conspired between themselves with the deliberate purpose of defrauding the plaintiff and during the life of the said option clause which is transcribed in full in said complaint they sold the properties adjudicated to Mrs. Elvira Olivieri Commins in payment of her condominiums, without notifying the plaintiff of any offer to purchase and with the knowledge on the part of "all of the defendants of the right of option held in regard to said properties at the time of the execution of the said sale by plaintiff Mario Mercado e Hijos".

The plaintiff then states in said complaint its willingness to redeem the property of the defendants who acquired as the result of the alleged conspiracy. It declares itself ready to pay the same amount paid by the purchasers and in order to show its good faith it attaches to its complaint and makes it part thereof another action to deposit money in court filed in the office of the clerk of this court which was filed after having requested of the defendants to convey to it the title to the properties fraudulently sold. (The complaint in the action to deposit money in court was filed together with the indispensable tender of payment.)

Defendant Mrs. Elvira Olivieri Commins filed a separate answer and the other defendants filed theirs jointly.

In the said answers the defendants admitted everything alleged in paragraphs 1, 2, 3, 4, 5, 7, 9 and 10 of the complaint and denied the remaining paragraphs and by way of special defense they pleaded as follows:

(a) That clause 7 of deed No. 13 of March 23, 1932, executed

before notary Fernando Zapater Martinez, acting in the place of notary Jose Tous Soto, was forced by plaintiff upon the defendant Olivieri Commins while the latter was indebted to plaintiff; that at the time of the said option to purchase and lease was inserted in the said deed of mortgage, the plaintiff was not a debtor but a creditor concerning said estates; that the plaintiff could not adjudicate to itself the estates of this defendant in case of nonperformance of the contract secured by mortgage nor could it prevent this defendant from alienating or freely disposing of such estates and that the option to purchase or redeem was extinguished by the fact of the payment in full by defendant Elvira Olivieri Commins of the aforesaid mortgage credit and that the plaintiff forfeited the right to redemption by conveying the mortgage credit to the heirs of Jose Tous Soto, and, besides, such right prescribed because more than four years had elapsed from the time of its creation. (Sections 1397 and 1078 of the Civil Code.)

(b) That said clause 7 is void, moreover, because the same amounts to an agreement whereby the mortgage is empowered to adjudicate to itself the mortgagor's property upon nonperformance of the contract secured by mortgage. (Sections 2 and 4 of Act No. 47 of April 13, 1916, to repress usury.)

(c) Because the same amounts to an agreement whereby the mortgagor is forbidden to alienate or freely dispose of her property. (Subdivision 4 of Article 107 of the Mortgage Law; *Van Syckel* v. *The Registrar of Property*, 3 P.R.R. 9 and *Clausells* v. *Registrar of Property*, 20 P.R.R. 298.)

(d) Because the same conflicts with Section 1412 of the Civil Code.

(e) Because it seeks to create a right that cannot be created, that is, a right of redemption to be exercised by someone who was not the vendor of the property but a mortgagee.

(f) Because, should such right of redemption be valid, the plaintiff failed to comply with the legal provisions as regard the tender of payment, inasmuch as the tender made by it was made separately, that is, within another proceeding, that is, in civil case

No. 310 of this court, instead of doing so within the above en titled case.

In the complaint in case No. 312, *In re:* Rescission of Lease, the same allegations are substantially made as in the complaint in case No. 311, with the only alteration of the allegation made in paragraph 11 of said complaint (case No. 312), that is to say:

That Mrs. Elvira Olivieri Commins, prior to March 8, 1937, in conspiracy with the other defendant, Emilio Blasini Totti, leased to the latter the rural estate known as "Juanita", which is described in paragraph 9 of the complaint in said case No. 312.

The defendants in the instant case No. 312, answered the complaint separately, admitting certain facts therein alleged and denying the others, and alleging also the same defenses pleaded by the defendants in case No. 311.

The trial of case No. 311, *In re:* Rescission of Sale, was held in this District Court of Ponce on the 13th, 14th, 15th and 16th of November, 1939, with the appearance of plaintiff Mario Mercado e Hijos, represented by its attorneys Felix Ochoteco and Pedro M. Porrata, the defendants appearing through the attorneys Luis Lopez de Victoria, Leopoldo Tormes and Jose O. Sabater.

Both sides submitted copious documentary and oral evidence which was admitted.

At the close of the trial of case No. 311 it was stipulated by all the parties, with the approval of the court, to submit, as they did, case No. 312 on the same evidence submitted by both sides on the aforesaid case No. 311.

Both cases were submitted on briefs which were duly filed and filling 208 pages, the last of them having been filed on September 20, 1940.

The court, from the admissions made in the answers of the defendants and from the evidence introduced by both sides which was duly and jointly considered, makes among others, the following:

FINDINGS OF FACT.

By public deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, defendant Elvira Olivieri Commins secured by a mortgage upon her condominiums in the estates Juanita and Indios, four promissory notes negotiable by indorsement which she executed, and at the same time she acknowledged to owe to plaintiff Mario Mercado e Hijos the sum of $41,256.89, and the latter partnership agreed to accept said promissory notes in payment of the amount owed.

Said mortgage deed contained, among others, the following clause:

> "SEVENTH: OPTION TO PURCHASE AND SELL AND TO LEASE.—Notwithstanding the foregoing clause the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

By a public deed No. 33 of May 9, 1933, executed before notary Fernando Zapater Martinez of Ponce, the partnership Mario Mercado e Hijos conveyed to the heirs of Jose Tous Soto the said mortgage credit, by means of the proper indorsement and delivery by said partnership Mario Mercado e Hijos to the heirs

of Tous Soto of the four mortgage notes already referred to. It does not appear from this deed of conveyance of credit that the partnership Mario Mercado e Hijos reserved to itself the rights of option to sell and lease specified in clause 7 of deed No. 13 of March 23, 1932, which clause 7 is hereinbefore transcribed in this opinion. Nor does it appear proven that such reservation of rights was made in the registry of property on the record corresponding to the conveyance of the mortgage credit.

Obligor Elvira Commins was advised of the conveyance of the credit by means of an uncertified copy of the deed of conveyance.

By deed No. 30 of February 25, 1937, executed before notary Luis Lopez de Victoria, Elvira Olivieri Commins mortgaged the aforesaid estates Juanita and Indios for $45,000 to defendant Manuel Francisco Lluberas Passarell, of which sum the latter retained the amount of $41,000 to satisfy the mortgage credit constituted in favor of Mario Mercado e Hijos and conveyed to the heirs of Jose Tous Soto.

By deed No. 47 of March 8, 1937, executed before notary Fernando Zapater, having first obtained the proper judicial authorization, the heirs of Jose Tous Soto cancelled the mortgage credit against Mrs. Elvira Olivieri Commins, which credit had been conveyed to said heirs by plaintiff Mario Mercado e Hijos.

By deed No. 40 of March 9, 1937, executed before notary Luis Lopez de Victoria, defendant Elvira Olivieri Commins sold for $40,000 the estate Indios to the other defendant Manuel Francisco Lluberas Passarell.

By another deed, that is, deed No. 41 of even date, March 9, 1937, and executed before the same notary Lopez de Victoria, Elvira Olivieri Commins leased to the other defendant Emilio Blasini Totti the rural estate known as Juanita.

By deed No. 72, executed in Ponce before notary Fernando Zapater on March 31, 1937, (that is, subsequent to the cancellation of the mortgage by the heirs of Jose Tous Soto), it was set forth by said heirs that "the conveyance made by the partnership Mario Mercado e Hijos to said heirs did not include the right or

rights set out in favor of Mario Mercado e Hijos in clause 7, *In re:* 'Option to Sell and Lease' contained in mortgage deed No. 13 of March 23, 1932 (Exhibit 'J' of plaintiff); Mario Mercado e Hijos reserving to itself the rights and obligations mentioned in said clause during the whole time of the life of the mortgage".

Deed No. 72, *supra,* was approved by this District Court of Ponce, according to judgment rendered on April 7, 1937, in civil case No. 299 of this court (Exhibit E of the plaintiff).

By deed No. 7 of April 7, 1937, executed before notary Pedro M. Porrata, Elvira Olivieri Commins was summoned to receive a certain sum of money pursuant to said clause 7 regarding option to sell and lease but Elvira Olivieri Commins refusing to accept the money.

Thereupon the partnership Mario Mercado e Hijos, on April 8, 1937, deposited in the office of the clerk of this District Court in case No. 310, *In re:* Deposit of Money in Court, the sum of $45,359.50, as per receipt No. 702 of the clerk (Exhibit H of plaintiff).

The plaintiff then, on April 8, 1937, filed the complaints in cases Nos. 311 and 312, *In re:* Rescission of Sale and Rescission of Lease, respectively.

It has also been shown that according to deed No. 73 of August 20, 1936, (while the mortgage credit conveyed to the Heirs of Jose Tous Soto was still in force), the partnership Mario Mercado e Hijos intervened in said deed No. 73, *In re:* Actual Division of Rural Estate and other particulars, which deed was executed before notary Tomas Paz Ruiz (Exhibit A of plaintiff) and gave its consent for said partition of property held in common.

It has also been shown that neither Elvira Olivieri Commins nor any of the defendants, nor anybody else in their behalf, advised in any way to plaintiff herein Mario Mercado e Hijos, prior to the time when they were agreed upon, the lease and sale of the estates Juanita and Indios, nor at any time afterwards, Mario Mercado e Hijos becoming aware of such deals on March 10, 1937. And that the said partnership always was and is now ready

to subrogate itself to the place of the purchasers and lessees of said estates for the same price and rentals and on the same terms as those of the contract of sale and lease whose rescission is hereby sought.

It also appears to have been shown that both Elvira Olivieri Commins and all the other defendants in cases Nos. 311 and 312 were advised, prior to the execution of the contract of sale and lease, of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios.

From the testimony of Elvira Olivieri Commins (page 81 of the transcript of record) it appears as a fact that she authorized her son-in-law Rafael Barletta to enter into negotiations with Mario Mercado e Hijos for the lease or sale of the estates Juanita and Indios.

From the testimony of Jose R. Peralta, manager of the plaintiff partnership, (page 126 *et seq.* of the transcript of record) and from certain telegrams and letters mentioned in such testimony and which were admitted in evidence, it appears as a fact that from December, 1936, until May 8, 1937, Rafael Barletta and the partnership Mario Mercado e Hijos held conversations and meetings in regard to the possible purchase and lease of the said immovables from Elvira Olivieri Commins to the plaintiff partnership.

Questions of Law.

The learned counsel for both sides, in elaborate and thorough briefs, raised and discussed very important questions of law, which the court has carefully studied and considered in connection with the fact alleged.

Counsel for both sides raised and discussed seven questions of law in their respective briefs.

We have studied and considered them all, but in our judgment the most important of them for the determination of the present cases are as follows:

"1.—Whether or not the plaintiff showed conspiracy and

fraud on the part of the defendants for the purpose of cheating the said plaintiff of its rights in connection with said clause 7 of option to sell and lease.

"2.—Whether or not clause 7 of said deed regarding the option to sell and lease binding the said mortgagor in favor of the said partnership became extinguished by virtue of the payment of the mortgage executed by Mrs. Elvira Olivieri Commins in favor of Mario Mercado e Hijos (Exhibit 'J' of the plaintiff).

"3.—Whether by virtue of the conveyance from Mario Mercado e Hijos to the Heirs of Jose Tous Soto of the mortgage credit referred to in Exhibit 'J' of the plaintiff, the rights set forth in said clause 7 of option to sell and lease were likewise conveyed."

For a logical consideration of the above legal questions we will invert the order of their presentation and we will begin with question No. 3.

Article 152 of the Mortgage Law reads as follows:

"Art. 152. A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry.

"The debtor shall not be bound by said contract to any further extent than he was by his own.

"The assignee *shall be subrogated to all the rights of the assignor.*" (Italics ours.)

The terms stipulated in the deed of conveyance of the mortgage credit are very explicit and do not leave any room for doubt as to the intention of the contracting parties, therefore the literal sense of its stipulations shall be observed (Section 1233 of the Civil Code, 1930 ed.) and there should not be understood as included in said contract things and cases different from those with regard to which the persons interested intended to contract (Section 1235 of the same statute). (*Sweet* v. *Zalduondo*, 26 P.R.R.

307; *Loiza Sugar Co.* v. *Hernaiz,* 35 P.R.R. 474; Section 26 of the Law of Evidence.)

According to Section 1759 of the Civil Code, the mortgage is essentially indivisible. The option to sell and lease was substantially part of said contract and, therefore, it was inseparable from the mortgage. (*Llinas* v. *Mariani,* 47 P.R.R. 543; *Montilla* v. *Van Syckel et al.,* 8 P.R.R. 153; *Puente* v. *Perez et al.,* 7 P.R.R. 181.)

Section 1418 of the Civil Code reads as follows:

> "Section 1418.—The sale or assignment of a credit includes that of *all the accessory rights,* such as the security, mortgage, pledge, or *privilege.*" (1930 ed.) (Italics ours.)

In his commentaries on the Civil Code, Vol. 10, pages 402–409, and commenting upon Section 1418 *et seq.* of said code (1930 ed.), Manresa, among other things, expresses himself as follows:

> "Now well: where nothing is stated, it is logical to presume, as the law presumes, *that the assignment of a principal right includes also the accessory right, which becomes a sort of supplement.*" (Italics ours.)
>
> "Where we do agree is that in the case of assignment of a credit subject to a resolutory condition, whose fulfillment depends upon the will of the creditor, *the latter cannot, after such credit is assigned, enforce the fulfillment of such condition.* On the one hand, because in agreeing upon the assignment he was a creditor no longer. And on the other hand, *because the assignment presupposes the waiver of his right which becomes incompatible with such waiver.*" (Italics ours.)

When Mario Mercado e Hijos conveyed to the heirs of Tous Soto the said mortgage credit it made a special stipulation in regard to the interests on the credit, but it failed to make any reservation in regard to the clause of option to sell and lease. Nor was said clause mentioned by the heirs of Tous Soto when it

applied to this court for leave to become the assignee of the credit, nor either when leave was sought for the cancellation of said credit by said heirs.

Neither deed No. 72 of May 31, 1937, executed before notary Zapater, regarding ratification of mortgage credit by the heirs of Tous Soto (Exhibit F of the plaintiff) nor the proceedings No. 299, before this court, regarding the approval of said deed, has any weight in the present cases, because said deed No. 72 was executed after the total cancellation of the mortgage credit by the heirs of Tous Soto.

For the foregoing, we come to the conclusion that "when Mario Mercado e Hijos conveyed to the heirs of Tous Soto the mortgage credit, it also conveyed the rights embodied in clause 7 of option to sell and lease".

Question of law No. 2, after the above statements when considering question No. 3, is decided by us affirmatively, as we come to the conclusion that "clause 7 of deed No. 13 of March 23, 1932, (Exhibit 'J' of the plaintiff) in regard to option to sell and lease become extinguished by virtue of the payment of the mortgage constituted by Elvira Olivieri Commins in favor of Mario Mercado e Hijos" (Section 1110 of the Civil Code, 1930 ed.).

We will now pass upon the question of law raised in No. 1, that is, "whether or not the plaintiff showed conspiracy and fraud on the part of the defendants for the purpose of cheating the said plaintiff of its rights in connection with said clause 7 of option to sell and lease".

The court having reached the two conclusions previously stated when affirmatively deciding the questions of law raised in Nos. 3 and 2, it necessarily has to reach the conclusion that Mario Mercado e Hijos, when bringing these actions on April 8, 1937, had neither right to nor interest in the mortgage that had been constituted in its favor by Elvira Olivieri Commins which Mario Mercado e Hijos had conveyed to the heirs of Jose Tous Soto.

"In an action to set aside an alleged fraudulent convey-

ance plaintiff cannot question the validity of the conveyance, *in the absence of allegation and proof that he is a creditor of the grantor.*" *First National Bank* v. *Eastman*, 144 Cal. 487, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 Pac. 1043. (Italics ours.)

(See also the case of *Congress Cigar Company* v. *Cabrera*, 45 P.R.R. 176.)

"Fraud must be proved by incontestable facts, or at least by a preponderance of evidence, for it cannot be established by presumption, conjecture or suspicion." (*Gomez* v. *Bravo et al.*, 34 P.R.R. 141; *Arruza* v. *Laugier*, 14 P.R.R. 24.)

"Every presumption being against fraud, and something more than a mere conjecture being necessary to establish its existence, it must be shown by means of clear, strong and convincing evidence." *Ortiz* v. *Clausells et al.*, 34 P.R.R. 509.

"A judge should not be impressed by a charge of fraud to the extent of exalting the importance of every fact on which suspicion may be raised of its having been committed and disdaining more logical deductions compatible with good faith." *Sabalier* v. *Iglesias et al.*, 34 P.R.R. 338.

The court comes to the conclusion that neither conspiracy nor fraud on the part of the defendants against the plaintiffs in these cases has been shown.

Having reached the foregoing conclusions, the court deems it unnecessary to consider the other questions of law raised and discussed in the present cases by counsel for both sides.

For the foregoing reasons it is the opinion of the court that a separate judgment should be rendered in each of cases Nos. 311 and 312, dismissing in each of them the complaint in all its parts, and adjudging the plaintiff to pay the costs and fees of counsel for the defendants.

Let a judgment be entered in each case congruent with the present opinion.

The undersigned judge wishes to state: that he is taking part in the determination of these cases under the authority expressly granted him in the *proviso* of Section 2 of Act No. 10, in regard to retirement, approved April 9, 1941, which became effective on the day of its approval, and that the resignation sent in by the undersigned judge in order to take advantage of the benefits granted by the said act of the Legislature of Puerto Rico became effective on the first of June, 1941.

D. SEPULVEDA,
District Judge, retired.

SERVICE OF NOTICE.

Attorneys PEDRO M. PORRATA *and* FELIX OCHOTECO, Jr., *Counsel for Plaintiff.*

Attorneys LUIS LOPEZ DE VICTORIA *and* LEOPOLDO TORMES, *Counsel for Defendants* LLUBERAS PASSARELL *and* EMILIO BLASINI.

Attorney JOSE SABATER, *Counsel for Defendant* ELVIRA OLIVIERI COMMINS.

You are hereby served with notice of the foregoing statement of the case and opinion delivered today.

I hereby certify: That the original of this service of notice has been filed in the record of the present case in Ponce, Puerto Rico, on this the 6th of October, 1941.

ALVARO MALDONADO,
Acting Clerk;
by J. AYALA,
Acting Assistant Clerk.

[Same Title.]

JUDGMENT OF DISTRICT COURT.

The court, on the grounds set forth in the opinion delivered on this day and attached to the record, renders judgment declaring that the law and the facts in the present case are adverse to plaintiff Mario Mercado e Hijos and favor defendants Elvira Olivieri Commins; Manuel Francisco Lluberas Passarell and his wife Hazell Kelly Lluberas; Antonia Lluberas Passarell; Rosa Elena Lluberas Passarell; Graciela Lluberas Passarell and her husband Antonio Valenti Maestre; Celia Lluberas Passarell and her husband Emilio Blasini Totti and Raquel Lluberas Passarell, and therefore dismisses the complaint in all its parts, and adjudges the plaintiff to pay the costs of this litigation in the sum of two thousand dollars ($2,000) as fees of counsel for defendants. And it is further ordered and decreed: that at the proper time and after compliance with the legal requisites there should be returned to plaintiff Mario Mercado e Hijos the sum of $45,359.50, deposited in court by said plaintiff in the case of this court No. 310, regarding deposit in court.

Let this judgment be entered as prescribed by law and let the marshal of this court issue at the proper time the writ for the execution thereof.

Delivered in Ponce, Puerto Rico, on this the sixth day of October, 1941, in accordance with Act No. 10 of Puerto Rico, approved April 9, 1941.

D. SEPULVEDA,
District Judge, retired.

[Same Title.]

SERVICE OF NOTICE OF JUDGMENT.

Attorneys FELIX OCHOTECO, Jr., *and* PEDRO M. PORRATA, San Juan, P.R., and Ponce, P R.

The undersigned clerk hereby notifies you that this District Court rendered judgment in the above-entitled case on October 6, 1941, which has been duly entered in the proper book and filed with the record in this case where you can inform yourself in detail of the terms thereof.

And as you are or represent the party aggrieved by the judgment, from which an appeal may be taken, I serve you with notice thereof, having filed with the record of this case a copy of it on February 6, 1941, in compliance with the provisions of Section 2 of the Act to amend Sections 92, 123, 227 and 299 of the Code of Civil Procedure, approved March 9, 1911. A copy of the judgment and of the statement of the case and the opinion of the court has been filed in my office together with the record on this the 6th of October, 1941, and personally delivered on even date to attorney J. C. Santiago Matos, of the law office of attorney Pedro M. Porrata at the latter's request.

Ponce, Puerto Rico, October 6, 1941.

A. MALDONADO,
Acting Clerk.

[Same Title.]

NOTICE OF APPEAL.

To the Clerk of this Honorable Court, to Attorneys JOSE SABATER *and* JOSE OLIVER SABATER, *Counsel for Defendant* MRS. ELVIRA OLIVIERI COMMINS, *and to Attorneys* LUIS LOPEZ DE VICTORIA *and* LEOPOLDO TORMES, *Counsel for the other Defendants:*

The plaintiff herein, feeling aggrieved by the judgment rendered by this Honorable Court on October 6, 1941,—

Hereby appeals from the same as to all its pronouncements to the Honorable Supreme Court of Puerto Rico, and you are hereby notified as required by law.

Ponce, Puerto Rico, October 27, 1941.

PEDRO M. PORRATA,
FELIX OCHOTECO, JR.,
Per: FELIX OCHOTECO, Jr.,
Counsel for Plaintiff.

Served with copy on this the 29th of October, 1941.

JOSE SABATER,
JOSE OLIVER SABATER,
Per: JOSE SABATER,
Counsel for Defendant
ELVIRA OLIVIERI COMMINS.

LUIS LOPEZ DE VICTORIA,
LEOPOLDO TORMES,
Per: LEOPOLDO TORMES,
LUIS LOPEZ DE VICTORIA,
Counsel for the other co-Defendants.

(There has been duly affixed hereto the filing seal of the court, evidencing that this notice was filed on October 30, 1941, at 3:20 P.M.)

[Same Title.]

CERTIFICATE OF SERVICE OF NOTICE.

I, J. C. Santiago Matos, having been duly sworn, do hereby state:

That the above is my name, that I am more than twenty-one years old, an attorney domiciled in Ponce, Puerto Rico, that I have been commissioned by counsel for the appearing plaintiff in the above-entitled case to serve counsel for defendants with copy of the enclosed notice of appeal. That pursuant thereto I per-

sonally delivered in their office in Yauco, Puerto Rico, at 9:00 A.M., October 30, 1941, a true and faithful copy of the enclosed notice of appeal to attorney Luis Lopez de Victoria. That I likewise served a copy of the said notice of appeal by delivering personally a true and faithful copy thereof in his Mayaguez, Puerto Rico, office to attorney Jose Sabater at 10:15 A.M. of October 30, 1941. That I likewise delivered a true and faithful copy of the aforesaid notice of appeal to attorney Leopoldo Tormes in his Ponce, Puerto Rico, office personally at 11:45 A.M. of October 30, 1941.

Ponce, Puerto Rico, October 30, 1941.

J. C. SANTIAGO MATOS, *Affiant.*

Sworn to and subscribed before me by Mr. J. C. Santiago Matos, whose personal characteristics are mentioned above and whom I personally know in Ponce, Puerto Rico, on this the 30th of October, 1941.

A. MALDONADO,
Clerk, District Court of Ponce.

(There has been affixed hereto and cancelled a $5.00 Internal Revenue stamp, and also the filing seal evidencing that this notice was filed on October 30, 1941 at 3:50 P.M.)

[Same Title.]

MOTION

REQUESTING THE TRANSCRIPT OF THE EVIDENCE IN THE PRESENT CASE.

To the Court:

Now comes the plaintiff herein through his undersigned attorney and respectfully requests:

For the purpose of perfecting the appeal taken in the present case from the judgment rendered therein, to order the reporter of this court who took down the notes in the case, to proceed to the preparation of the transcript of the evidence herein, which must

include all the evidence submitted and admitted, as well as all the proceedings, orders and rulings of the court, and the objections and exceptions from counsel for both sides, such transcript of the evidence to be prepared within the statutory time.

Ponce, Puerto Rico, November 1, 1941.

Respectfully,

PEDRO M. PORRATA.

(There is affixed hereto a filing seal evidencing that this notice was filed on November 1, 1941, at 8:25 A.M.)

[Same Title.]

ORDER.

Having considered the motion filed by plaintiff in the above-entitled case requesting the transcript of the evidence in the present case, the court grants said motion and orders therefore the reporter who took down the notes in the present case to proceed to the preparation within the statutory time of the transcript of the evidence in the present case, which shall contain all the evidence submitted and admitted by the court, as well as all the proceedings, orders and rulings of the court, and the objections and exceptions from counsel for both sides, for the purpose of sending up said transcript of the evidence to the Supreme Court of Puerto Rico, for the purpose of the appeal taken from the judgment rendered in this case, and said reporter shall prepare the said transcript within the time allowed by law for the purpose.

Ponce, Puerto Rico, November 1, 1941.

R. A. GADEA PICO,
District Judge.

Notified: 11:00 A.M., November 1, 1941.

JUSTO M. BODON, *Reporter.*

We, Pedro M. Porrata, one of the attorneys for plaintiff; Leopoldo Tormes, one of the attorneys for defendants Lluberas Passarell, and Jose S. Sabater, one of the attorneys for Mrs. Elvira Olivieri Commins, do hereby certify:

That the foregoing transcription is a true and faithful copy of their respective originals of the record in the present case on file in the District Court of Ponce, to which we refer.

In testimony whereof and for the purpose of the appeal taken by plaintiff Mario Mercado e Hijos to the Supreme Court of Puerto Rico, from the judgment rendered by this District Court of Ponce, we sign these presents in Ponce, Puerto Rico, February 12, 1942, stating that attorney Tormes as well as attorney Jose S. Sabater, respectively, received a copy of this transcript of record.

PEDRO M. PORRATA,
One of the Attorneys for Plaintiff.

LEOPOLDO TORMES,
One of the Attorneys for
Defendants LLUBERAS PASSARELL.

JOSE SABATER,
Per: LEOPOLDO TORMES,
One of the Attorneys for
Mrs. ELVIRA OLIVIERI COMMINS.

IN THE DISTRICT COURT FOR THE JUDICIAL DISTRICT OF PONCE, PUERTO RICO.

Civil 311. Rescission of sale.

Mario Mercado e Hijos, Plaintiff,

v.

Elvira Olivieri Commins, Manuel Francisco Lluberas Pasarell and his wife Hazell Kelly Lluberas, Antonia Lluberas Pasarell, Graciela Lluberas Pasarell and her husband Antonio Valenti Maestre, Celia Lluberas Pasarell and her husband Emilio Blasini Totti, and Raquel Lluberas Pasarell, Defendants.

Civil 312. Rescission of lease and other particulars.

Mario Mercado e Hijos, Plaintiff,

v.

Elvira Olivieri Commins and Emilio Blasini Totti, Defendants.

TRANSCRIPT OF THE EVIDENCE.

On November 13, 1939, this case was called for trial, the court being presided by its judge Hon. Domingo Sepulveda. The plaintiff appeared by its attorneys Felix Ochoteco, Jr., and Pedro M. Porrata, and the defendants by their attorneys Luis Lopez-de-Victoria, Leopoldo Tormes-Garcia and Jose O. Sabater.

Judge: Are the parties ready?

Attorney Ochoteco: We are ready.

Attorney Tormes: Ready.

Judge: Are these cases to be tried together or separately?

Attorney Ochoteco: Well, we have in mind, after the termination of the first case, to submit the second case upon additional evidence in regard to some facts.

Judge: Which is the title of the first case?

Clerk: Civil number 311, for rescission of sale and other particulars.

Judge: Who are the attorneys for the plaintiff?

Attorney Ochoteco: Pedro M. Porrata and Felix Ochoteco, Jr.

Judge: Who are the attorneys for the defendants?

Attorney Lopez-de-Victoria: In this case this attorney represents the Lluberas-Pasarell brothers and defendant Emilio Blasini, and states that attorney Leopoldo Tormes joins him as attorney of record for defendants.

Judge: Then, whom do attorneys Lopez-de-Victoria and Leopoldo Tormes represent?

Attorney Lopez-de-Victoria: The Lluberas-Pasarell brothers and the defendant Emilio Blasini.

Judge: And attorney Sabater?

Attorney Sabater: Attorney Jose Sabater represents the other defendant; he is absent from the Island of Puerto Rico; he is my father and I appear in his stead.

Judge: What is your name?

Attorney Sabater: Jose O. Sabater.

Judge: What does the O stand for?

Attorney Sabater: For Oliver. Oliver is a surname, but in my case it is a name; that is why I use the abbreviation O.

Judge: Whom do you represent?

Attorney Sabater: Defendant Elvira Olivieri Commins.

Judge: Then, are the parties ready for the trial of this case?

Attorney Tormes: We are ready.

Attorney Ochoteco: With reference to the plaintiff, we want to state that we have filed the proper motion for the summoning of the witness Rafael Barleta, which summons was delivered, from my best information, in the office of the marshal of this court. We would like to know if it has been served on Mr. Barleta.

Judge: Rafael Barleta, Mayaguez.

Marshal: The marshal's return is attached—

Judge: How many complaints are there?

Attorney Ochoteco: One complaint only.

Judge: Has not it been amended?

Attorney Ochoteco: No, sir.

Judge: And about the answer?

Attorney Ochoteco: One answer only. With regard to the defendants Lluberas there has been filed an answer, and another with regard to the defendant Elvira Olivieri Commins.

Judge: It seems that the clerk wishes to report on something. What is the clerk's report?

Clerk: This morning, Mr. Juan Morales, marshal of this court, received the return of the summons served on Mr. Emilio Blasini Totti, and of the summons served on Elvira Olivieri Commins and Francisco Manuel Lluberas.

Marshal: As to Mr. Barleta, the marshal of Mayaguez informs me that he could not be found in that city to be summoned to appear today.

Attorney Ochoteco: Let the marshal's statement be inserted in the record for future reference when pertinent.

Judge: Then, please inform the court the issue in the present case.

Attorney Ochoteco: In short, this is an action for rescission of contract of sale and other particulars, the essential facts alleged in the complaint being as follows: that plaintiff Mario Mercado e Hijos is an agricultural civil partnership, domiciled in Ponce, Puerto Rico, engaged in farming. That on certain occasion the defendant borrowed a sum of money from the plaintiff, and, as security for this loan, executed a voluntary mortgage for forty thousand dollars, represented by four mortgage promissory notes in favor of the plaintiff upon some undivided joint interest held by defendant at the time in two estates jointly owned by her and her sister. That in the mortgage deed there was inserted a special clause, on which this action is based, which literally transcribed reads as follows: "Notwithstanding the foregoing clause,—

Judge: Is that the seventh clause?

Attorney Ochoteco: "Seventh.—Option to Purchase and Sell and to Lease.—Notwithstanding the foregoing clause, the debtor,

as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates 'Indios' and 'Juanita' upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

Further on it is alleged in the complaint that plaintiff Mario Mercado e Hijos conveyed to the heirs of Jose Tous Soto said mortgage credits for forty thousand dollars, reserving to itself the right of option to purchase and lease. It is also stated that afterwards defendant Elvira Olivieri Commins together with her sister, proceeded to the winding up of their joint ownership of the "Indios" and "Juanita" estates with the intervention of plaintiff Mario Mercado e Hijos.

That subsequently, it is alleged in the complaint, the defendants conspired among themselves for the purpose of defrauding, as they did defraud, the plaintiff of its right of priority to lease or to purchase the immovable to which the complaint refers, and proceeded as alleged in the complaint and finally deprived the plaintiff of its option to lease or purchase, without defendant Elvira Olivieri-Commins ever notifying Mario Mercado e Hijos that somebody was interested in leasing or purchasing the estates in question.

It is further alleged in the complaint that plaintiff would have been and is now ready to acquire for the same purchase price paid by the defendant purchasers and in equal terms the estates to

which the complaint refers. That to that effect plaintiff made a formal notarial demand of the defendant to accept the purchase money tendered, and it likewise demanded of the other defendants to respectively rescind the contract of sale and lease which had been executed, and both the former and the latter have refused, for which reason the plaintiff has filed this rescissory action praying for the nullity of all such proceedings as regards the sale and the lease, and, consequently, to subrogate the plaintiff to the rights of the defendant purchasers, and to the lessee who is likewise a defendant. Such is plaintiff's cause of action.

Judge: The answer?

Attorney Lopez-de-Victoria: Our contention—

Judge: The answer of Lluberas-Pasarell.

Attorney Lopez-de-Victoria: We admit the facts—

Judge: The answer of defendants Lluberas-Pasarell.

Attorney Lopez-de-Victoria: We admit the deed of mortgage, the personality, the existence of the estates and the existence in the deed of the clause read by attorney Ochoteco.

Judge: Then you accept averments 1, 2, 3, 4 and 5?

Attorney Lopez-de-Victoria: Yes, sir.

Judge: In every respect?

Attorney Lopez-de-Victoria: Yes, sir.

Judge: The first, second, third, fourth and fifth.

Attorney Lopez-de-Victoria: Averment 7 is also admitted.

Judge: Then the seventh and ninth are also admitted in the answer?

Attorney Lopez-de-Victoria: And the tenth and the thirteenth.

Judge: And is number 10 admitted?

Attorney Lopez-de-Victoria: Yes, sir.

Judge: And number 13?

Attorney Lopez-de-Victoria: Yes, sir, and the sixteenth.

Judge: Admitted.

Attorney Tormes: The facts denied are those as to any contract of sale having been agreed upon, perfected and executed prior to the cancellation of the mortgage. We have also denied that any

right of option to purchase and lease had been reserved to Mario Mercado e Hijos at the time of the assignment of the mortgage credit to the heirs of Tous-Soto.

Judge: The above refers to the answer of Lluberas-Pasarell.

Attorney Tormes: We also alleged some new matters of defense; special defenses that have been alleged against the complaint, and which read as follows:

"(1) That the option to purchase and lease stipulated in the seventh clause of mortgage deed No. 13 of March 23, 1932, executed before notary Fernando Zapater, acting in the place of notary Jose Tous-Soto, which clause seven is transcribed in the sixth paragraph of the complaint, is void for the following reasons:

"(a) Because the same amounts to an agreement whereby the mortgagee is empowered to adjudicate to itself the mortgagor's property by reason of the nonperformance of the contract secured by mortgage (sections 2 and 4 of Act No. 47 of April 13, 1916 to repress usury).

"(b) Because the same amounts to an agreement whereby the mortgagor is precluded from alienating or freely disposing of her property (subdivision 4 of section 107 of the Mortgage Law; *Van Syckel* v. *The Registrar of Property*, 3 P.R.R. 9; and *Clausells* v. *Registrar of Property*, 20 P.R.R. 298).

"(c) Because it conflicts with section 1412 of the Civil Code.

"(d) Because it tends to create a right that cannot be created, that is, a right of redemption to be enforced by someone who was not the vendor of the property but a mortgagee against a lessee.

"(2) Should said clause 7 of deed No. 13 of March 23, 1932, executed before notary Fernando Zapater-Martinez, acting in the place of notary Jose Tous-Soto, be valid, the right of redemption would be extinguished and prescribed by

reason of the lapse of more than four years after the same had been granted (sections 1397 and 1078 of the Civil Code).

"(3) Should plaintiff be entitled to an action of conventional redemption against defendants Lluberas-Pasarell, the plaintiff has failed to comply with the legal provisions regarding the very essential particular of the deposit in court, because although it deposited such amount in court, it did it separately, that is, within a different proceeding, that is, civil case number 310 of this court, instead of doing so within this same proceeding, case number 311, for which reason such deposit in court is not legally binding in the present case."

These are our special defenses.

Judge: What is the answer of Mrs. Elvira Olivieri Commins?

Attorney Sabater: As to the answer of our client, Mrs. Elvira Olivieri-Commins, we admit paragraphs 1, 2, 3, 4 and 5 of the complaint. We also admit paragraph 7 of the complaint; the averments of paragraph 9 and the averments of paragraph 10, and we refute the other paragraphs of the complaint as follows: the defendant admits that in mortgage deed number 13 of March 23, 1932, executed before notary Fernando Zapater, acting in the place of notary Jose Tous-Soto, there was inserted clause seven which is transcribed in paragraph 6 of the complaint; but it is alleged by this defendant that said clause was inserted by said plaintiff in said mortgage deed without this defendant being aware of its scope and meaning, to which she was compelled to submit due to her status as debtor at the time of the execution of said deed; that at the time of the execution of such mortgage deed and insertion of that clause, plaintiff Mario Mercado e Hijos was neither a co-owner of the mortgaged property nor a vendor thereof; that it was agreed between the plaintiff and this defendant that such agreement would be effective between the parties as long as the defendant was a mortgage debtor to Mario Mercado e Hijos and this defendant never consented to empower the plain-

tiff to appropriate to itself the property nor was it agreed or covenanted between the parties to forbid to defendant to dispose freely of her property.

This defendant denies in its entirety paragraph 8 of the complaint and alleges on the contrary that when making the conveyance referred to in said paragraph and in the deed whereby the same was carried out no reservation was made as regards such agreement and when this defendant was notified of such conveyance of mortgage credit she was not advised nor acquainted with nor notified in legal form or otherwise that plaintiff Mario Mercado e Hijos had reserved to itself such right of option to sell and repurchase, it being stated in said deed of conveyance of the said mortgage credit—which is deed number 33, executed in Ponce on May 9, 1933, before notary Fernando Zapater Martinez—that the grantor Mario Mercado e Hijos subrogated itself to the place of the grantee in the same degree and priority.

Regarding paragraph 11 of the complaint this defendant denies that on March 9, 1937, when this defendant sold the immovables referred to in such paragraph by deed number 40, executed in Mayaguez, on the same 9th of March, 1937, before notary Lopez-de-Victoria, there was still in force the option clause inserted in the mortgage deed of March 23, 1932; and in opposition to the averments of said paragraph she alleges that at that time the aforesaid mortgage credit had already been fully paid and cancelled, which payment and cancellation were effected pursuant to the judicial authorization from the District Court of Ponce, according to deed number 47, executed in Ponce before notary Fernando Zapater-Martinez on March 8, 1937.

Concerning said paragraph 11 of the complaint, this defendant denies to have conspired with the other defendants or with anybody else to defraud the plaintiff as to the agreement to repurchase referred to in said paragraph or for any other purpose or end; and this defendant further alleges in opposition to the allegations of said paragraph that when she sold to the other defendants, said option clause, which was forced by the plaintiff upon

this defendant according to the mortgage deed of March 23, 1932, and that it was illegal and improper, was cancelled because this defendant had fully paid the mortgage credit and for that reason this defendant had ceased to be indebted to the plaintiff, this defendant disposing of said properties after having fully paid the mortgage in which the said option clause had been forced by the plaintiff upon the defendant.

As regards paragraph 12 of the complaint, this defendant denies that on March 9, 1937, she and the other defendants embodied in a public deed, executed before notary Luis Lopez-de-Victoria, the contract of sale entered into between them and alleges on the contrary that the said sale was entered into and perfected on March 9, 1937, by deed number 40, executed in Mayaguez on the date above stated before the aforesaid notary when the mortgage credit constituted in favor of the plaintiff and conveyed by the latter to the heirs of Jose Tous-Soto had already been fully paid and cancelled.

Concerning paragraph 13 of the complaint this defendant admits that, having fully paid the mortgage credit referred to to the grantee thereof, she failed to advise the plaintiff regarding the sale made by her to the other defendants, to which reference is made in said paragraph; and she denies for lack of information and belief that the plaintiff partnership got information regarding the contract of sale on March 10, 1937, or at any other time.

Regarding paragraph 14 of the complaint this defendant denies the hypothetical allegation that the plaintiff, should it have been advised of the proposal to purchase, would have been willing to pay for the properties and the condominiums the amount paid to this defendant by the defendant purchasers and this defendant further alleges that prior to the sale made to the other defendants by this defendant, during the life of the mortgage in which the option clause was imposed on this defendant, the plaintiff refused on several occasions to buy from the defendant on the ground that no other purchaser would be forthcoming and that when the

mortgage credit became due it would compel this defendant to either sell or have the mortgage foreclosed.

As to paragraph 15 of the complaint this defendant denies that plaintiff is entitled to avail itself of the option to purchase set forth in the mortgage deed of March 23, 1932, executed before notary Fernando Zapater-Martinez, acting in the place of notary Jose Tous-Soto, for the reason that this defendant had fully paid said mortgage and had fully cancelled the same and being, after the cancellation, at liberty to dispose freely of her property.

Regarding paragraph 16 of the complaint this defendant admits that the deposit in court to which said paragraph refers was effected by the plaintiff in civil case number 310 of this court, but she alleges that such deposit in court is legally ineffective because the same was not effected in this action.

In answer to paragraph 17 of the complaint this defendant reproduces and makes part of the present answer all the denials and averments made by this defendant in this answer or that she may make in the future to the allegations of the plaintiff as set forth in the complaint in the said civil case number 310 of this court regarding deposit in court between these same parties.

Next follow the special defenses. This defendant alleges that clause seven of deed number 13 of March 23, 1932, executed before notary Fernando Zapater-Martinez, acting in the place of notary Jose Tous-Soto, was forced by the plaintiff upon the defendant while the latter was indebted to the plaintiff; that at the time said option to purchase and sell was inserted in the said mortgage deed, the plaintiff was not the vendor of the immovables but only a mortgagee; that plaintiff could not adjudicate to itself the property of this defendant in case of nonfulfillment of the contract secured by mortgage nor could it prevent this defendant from disposing of and alienating freely said property and that the option to repurchase or redeem was extinguished by the full payment by this defendant of the said mortgage credit and that the right of redemption was forfeited by plaintiff when conveying its mortgage credit to the heirs of Jose Tous-Soto and it moreover

had prescribed because four years had elapsed from the time the same was granted. (Sections 1397 and 1078 of the Civil Code.)

Judge: The court is fully informed. Then, these are the allegations of both parties. Are there any witnesses to be sworn in, witnesses for the plaintiff and for the defendants?

Attorney Tormes: Defendants' witnesses are: the defendants themselves, the clerk of the court, Mr. Lluberas and Mr. Blasini.

Attorney Ochoteco: Mrs. Elvira Olivieri—

Attorney Tormes: Dr. Blasini—

Judge: Let the witnesses, who are present, be sworn in. Please stand up.

[The clerk administers the oath to the witnesses for both parties who are present.]

Judge: Then, the hearing of the evidence will begin at two o'clock, at 2:30 this afternoon; and I say 2:30 because I have to dispatch some official business. At 2:30 sharp.

Attorney Tormes: Yes, sir.

Judge: Recess until this afternoon, at 2:30.

[Recess.]

AFTERNOON SESSION.

Judge: The session of the court is opened. As to the witnesses, is there any objection to their staying in the court room under oath? Any objection from the parties?

Attorney Ochoteco: None.

Attorney Tormes: Neither we.

Judge: Then such witnesses as are sworn in remain in the court room. Evidence for the plaintiff.

Attorney Ochoteco: As to record number 310, *in re* deposit, Mario Mercado e Hijos *v.* Elvira Olivieri-Commins, I have been informed that the same was here, but it is not here.

Judge: The clerk will inform.

Attorney Ochoteco: We might proceed with some other evidence.

Judge: Then, let some other evidence be introduced.

Attorney Ochoteco: We offer in evidence a certified copy of deed number 73, of August 20, 1936, executed before notary Tomas Paz-Ruiz, *in re* actual division of rural property, joint ownership and other particulars.

Attorney Tormes: We object, as irrelevant, immaterial and impertinent, on the ground that at the time of the execution of this deed there was no privity at all between defendant Elvira Olivieri-Commins or the other defendants Lluberas-Passarell and the plaintiff Mario Mercado e Hijos.

Judge: What deed is it?

Attorney Tormes: Deed of partition of property, actual division of rural property and property held in common.

Judge: What is its relevancy?

Attorney Ochoteco: Mrs. Elvira Olivieri-Commins owned jointly with her sister certain undivided interests. They then proceeded to dissolve the joint ownership with the intervention of the partnership Mario Mercado e Hijos, there being adjudicated to Mrs. Elvira Olivieri-Commins the immovable involved in this litigation, affected by the option to purchase and lease the subject matter of the action. What is involved is the ownership title of Mrs. Elvira Olivieri-Commins.

Mr. Tormes: When this deed was executed, on August 20, 1936, there was no relation between Elvira Olivieri-Commins and Mario Mercado e Hijos. According to a deed executed in May 1933, Mario Mercado e Hijos had assigned all its rights in the mortgage, without any reservation, to Mrs. Belen Gonzalez, widow of Tous-Soto, and her children. This is the objection.

[Attorney Tormes continues arguing.]

Judge: Are these properties the ones mentioned and referred to in this suit?

Attorney Ochoteco: The complaint in this case.

Judge: The purpose for which it is submitted, the court thinks—

Attorney Ochoteco: For two purposes: for the purpose of prov

ing the ownership title of Elvira Olivieri-Commins to the property involved, and of proving that notwithstanding the assignment made by Mario Mercado e Hijos to the heirs of Jose Tous-Soto, of the mortgage credit to which the complaint refers, Mario Mercado e Hijos continued being the holder of this option, and intervened as such holder.

Judge: The court admits it for the purpose for which it has been submitted, and the same is marked Plaintiff's Exhibit A.

Attorney Tormes: We take exception.

[The document submitted and admitted in evidence as Plaintiff's Exhibit A is faithfully and correctly transcribed, and is attached as a separate paper at the end of this transcript, marked "Plaintiff's Exhibit A".]

Attorney Ochoteco: Certified copy of deed number forty, of March 9, 1937, before notary Luis Lopez-de-Victoria, on partial cancellation of mortgage, sale of rural property and modification of mortgage clauses.

Judge: Executed between whom?

Attorney Ochoteco: Between Elvira Olivieri-Commins and the spouses Manuel Francisco Lluberas-Pasarell and Hazel Kelly Lluberas.

Attorney Tormes: No objection.

Judge: Admitted, it is marked Plaintiff's Exhibit B.

[The document submitted and admitted in evidence as Plaintiff's Exhibit B is faithfully and correctly transcribed and is attached as a separate paper at the end of this transcript, and marked "Plaintiff's Exhibit B".]

Attorney Sabater: With reference to Plaintiff's Exhibit A the defendant Elvira Olivieri Commins takes exception to the ruling of the court, and with reference to Exhibit B there is no objection.

Judge: Let it be so recorded.

Attorney Ochoteco: We submit in evidence certified copy of deed number ten of July 7, 1935, *in re* extension of partnership.

Attorney Tormes: Examined, and no objection from the defendant.

Judge: The other party.

Attorney Sabater: No objection.

Judge: Then let it be admitted and marked Plaintiff's Exhibit C.

[The document submitted and admitted in evidence as Plaintiff's Exhibit C is faithfully and correctly copied, and is attached as a separate paper at the end of this transcript and marked "Plaintiff's Exhibit C".]

Attorney Ochoteco: Certificate of the registrar of property of Ponce of January 13, 1938.

Judge: Referring to what?

Attorney Ochoteco: In connection with the deal between Mario Mercado e Hijos and Elvira Olivieri-Commins concerning this property, and especially, moreover, with regard to clause 7 of the contract of mortgage as to the fact that it was expressly recorded in the Registry of Property.

Attorney Tormes: Although it is redundant—

Judge: What is your purpose in submitting it?

Attorney Tormes: We have no objection.

Attorney Sabater: No objection.

Judge: Admitted and let it be marked Plaintiff's Exhibit D.

[The paper submitted and admitted in evidence as Plaintiff's Exhibit D, is faithfully and correctly transcribed and attached as a separate paper at the end of this transcript, marked "Plaintiff's Exhibit D".]

Attorney Ochoteco: Certified copy of deed number 72 of March 31, 1937, executed before notary Fernando Zapater-Martinez, on ratification by Belen G., widow of Tous-Soto, and others.

Attorney Tormes: Examined by the attorney representing Lluberas and Blasini, and we reserve to ourselves the right to object. We object to the admission of this deed for the following reason: Because in this deed there appear a minor of seventeen years of age and an incapacitated one called Jose Tous-Gonzalez. The former, seventeen years old, represented by her mother with *patria potestas* over him and over the incapacitated one. When the

ratification was made in this deed authorization from this court had not been previously obtained, and it is a ratification which the court is without jurisdiction to grant, as property of minors is involved.

[Attorney Tormes argues extensively his objection, citing the case of *F. Zayas, S. en C.* v. *Torres,* 51 P.R.R. 772.]

Judge: What page?

Attorney Tormes: Page 772 *et seq.* It happens that in this case the ratification was effected without first obtaining authorization from the court, real rights on real property being involved, requiring the judicial authorization of the court. On the other hand, this deed cannot prejudice third persons, nor does it appear that the same has been entered in the Registry of Property. According to the provisions of the Mortgage Law, it cannot be admitted in evidence without the above requisites. Moreover, by this deed it has been sought to put life into something that was already extinguished. The deed was executed on March 31, 1937, in reference to a mortgage credit that had been held by Mario Mercado e Hijos about the year 1933, and that on that date the same had been assigned, without any reservation at all, to Belen Gonzalez, widow of Tous-Soto and her children, which included a minor and an incapacitated one. By this deed reference is made, or modification or explanation attempted as regards such mortgage credit, which had been totally cancelled by a deed executed in Ponce on March 8, 1937. We think that such procedure is contrary to the provisions of Section 1187 of the Revised Civil Code. Because, moreover, this deed constitutes *res inter alios acta* between Mario Mercado e Hijos and the widow of Tous-Soto. Because Mario Mercado e Hijos was "in estoppel by conduct".

[Attorney Tormes argues extensively on his objection.]

In this way, such evidence cannot prejudice a third person, and it is irrelevant, immaterial and inadmissible, and cannot operate against any of the defendants. This is the objection of defendants Lluberas-Blasini.

Attorney Sabater: This party objects to the admission of such

deed of ratification for the same reasons advanced by my colleague attorney Tormes, and for the reason that a mortgage credit could not be split into a mortgage credit, an option and a right of redemption clause.

[Attorney Sabater discusses the point.]

Judge: The other party?

Attorney Ochoteco: Please the court, this objection, perhaps not so extensively expressed, was duly raised by our colleague attorney Lopez-de-Victoria during the trial of the ejectment suit before this Honorable Court. It was offered in evidence—

Judge: This same deed?

Attorney Ochoteco: This one. The record says: "Certified copy of deed number 72 of March 31, 1937, executed before notary Fernando Zapater, *in re* ratification, by Belen, widow of Tous-Soto, and others." It is the same deed.

Judge: Was it then submitted by defendant?

Attorney Ochoteco: Yes, sir. We were the defendant in the ejectment suit. The then plaintiff, and now defendant, says:

> "Please the court, for the same reasons adduced in our first discussion, we object to the admission of this deed, and, besides, because this is a deed in which terms of a previous written contract are explained; it is a deed executed on March 31, 1937, without it being notified, a transfer of a mortgage credit being involved, to the original mortgage debtor; because it does not appear from this deed that the notary before whom it was executed had officially entered on his protocol the deed to which this ratification refers, the verified copy thereof and the notice of the assignment of the mortgage credit. This deed explains the assignment of the mortgage credit to the Heirs of Tous Soto. That assignment was fully and absolutely made, as appears from the same deed already admitted in evidence, and, afterwards, on March 31, 1937, Belen Tous-Soto, by herself and in representation of her minor children, and Mario Mercado e Hijos, explained

and ratified that Mario Mercado e Hijos reserved a right of option. We oppose the admission of this instrument because in its execution section 1187 of the Civil Code of Puerto Rico (1911 ed.), as well as section 1173 of the Civil Code of 1930, have been violated. It could not operate in any way against third parties. This was the objection.

"Judge: That goes to the scope of the evidence, and will be proven from the evidence on its merits when the parties argue the case in their briefs. Admitted and marked Defendant's Exhibit F."

This same argument of the distinguished colleague appears before at length in the record. The court will see, and we respectfully allege, save a different opinion of the court to the contrary, that the jurisprudence invoked by my colleague is not applicable.

[Attorney Ochoteco argues extensively.

[Attorney Tormes argues also.]

Judge: Here mention has been made of the judicial authorization proceeding.

Attorney Ochoteco: It will be duly offered in evidence.

Judge: It would be well, of course,—

Attorney Ochoteco: We had in mind to move the court for leave to withdraw our offer to submit the deed, in order to submit first the record.

Judge: Motion granted for the present. When we have both of them on view, we may judge. For the present then such paper is withdrawn. Let us proceed with the evidence.

Attorney Ochoteco: We are going to make a joint proposal, with objection to the exhibits being marked differently, because they mutually supplement each other. Deed number 72 executed on March 31, 1937, before notary Fernando Zapater-Martinez by Mrs. Belen G., widow of Tous-Soto, and others.

Judge: Is that the same deed?

Attorney Ochoteco: Yes, sir. And the record of this court

civil number 299, *in re* ratification of deed, Belen Gonzalez-Salicrup, widow of Tous, et al.—

Judge: What number?

Attorney Ochoteco: Two hundred ninety-nine. For the purpose of the record, does my colleague accept the authenticity of the record?

Attorney Tormes: This defendant admits that it is the same action, and that it is under the custody of the clerk of the court.

Attorney Ochoteco: We submit these papers in evidence.

Attorney Tormes: As regards the deed, no objection.

Judge: Is that the record?

Attorney Tormes: As regards the record, we are gong to object. We are going to object to the admission of record number 299, for the following ground, among others: because the contents of this record and the order made thereon, which tended to ratify deed number 72 of March 31, 1937, executed before notary Zapater, is the result of a conspiracy between the parties, who apparently contracted or appeared to be contracting in said deed. Section 67, of the Law of Evidence, is to the effect that any judicial record may be impeached by evidence or want of jurisdiction in the court or judicial officer, of collusion between parties or of fraud in the party offering the record in respect to the proceedings.

[Attorney Tormes argues extensively on his objection, and cites 39 P.R.R. 584; 35 P.R.R. 811; 27 P.R.R. 315; and 30 P.R.R. 209.]

We are of the opinion, from the above grounds, that neither the deed nor the record constitutes any legal evidence that might affect the rights of the defendants Lluberas Pasarell Blasini and Mrs. Elvira Olivieri Commins, and we have argued so long because these instruments constitute the nerve of the action.

Judge: The other party?

Attorney Ochoteco: Please the court, my colleague is making statements about the abstract law, with which we concur. Now we understand that our distinguished colleague makes the same mistake frequently made by us attorneys, and such mistake is that

in objecting to the admissibility of a paper we take for granted and as proven facts which have not yet been proven, and it is sought by means of an objection to have the presiding judge pass upon the merits of the litigation.

[Attorney Ochoteco argues the point.]

Upon these statements and unless our colleague attorney Porrata wishes to make further statements, we submit the point to the court.

Judge: Are you both representing the same plaintiff?

Attorney Ochoteco: Yes, sir.

Attorney Sabater: As far as Mrs. Elvira Olivieri Commins is concerned, we make the same objection that was made by my colleague Tormes, and let the same be recorded.

Judge: Of course this court has given so much attention to the arguments from both sides, because both sides have stated that these papers constitute the nerve of the litigation. The nerve does not mean the whole muscular system, but nerve means the main part, the part that drives. Without nerves no organism can live. That is why the court has given so much attention to the arguments. The court might have passed upon the question from the start, but has heard with much pleasure such enlightening arguments; but there is a point here, on which both parties agree, and it is that if this evidence was not admitted now, the suit could not stand. But there is another evidence stated by the parties, so that these papers are not the only point of evidence. If this were the last point the court would then stop there and say: "We are going to pass upon this question in accordance with this instrument, which is the nerve", but as there is some other documentary and oral evidence which has been sworn in without being heard, the court is of the opinion that it would not be wise to attempt to pass upon this question now, although it has heard the parties and some jurisprudence and sections of the law have been cited. These papers are links in the chain of evidence, and according to the theory advanced by the plaintiff when stating his case this morning, there is something more than

these papers that must be submitted to the consideration of the court. There will also be some evidence from the defendants. What the court means briefly is that for the better ends of justice and the best application of the law and the procedure and less risk of mistakes, the best way would be and is for the court to admit this evidence in order to accord it any probatory value to which it may be entitled, together with the rest of the evidence from both sides. Upon the submission of all the elements of evidence brought by both sides the court then, having all the elements before it, shall decide. For this reason the court decides as follows: the court admits the evidence, these papers, that is, deed number 72 and the record of the court, regarding judicial authorization, number 299, to accord to it any probatory value that it may have in connection with the remainder of the evidence as a whole in this case, to be submitted by both sides. Admitted, and respectively marked letters E and F of the plaintiff. Admitted.

[The papers submitted and admitted in evidence as Exhibits E and F of Plaintiff, are faithfully and correctly transcribed and are attached as separate papers to this transcript as "Exhibit E" and "Exhibit F of the Plaintiff".]

Mr. Tormes: We take exception in behalf of defendants Llubéras-Blasini on the same grounds, *supra*.

Mr. Sabater: Exception is taken by defendant Mrs. Elvira Olivieri Commins on the same grounds stated by the attorney for the other defendants.

Judge: The court enlarges its order in the sense that it does not deprive any of the parties, when the time comes to settle this case on its merits, from insisting again on the value that might be attached to these papers; that the court will pass necessarily on this point, but it shall be when weighing the evidence as a whole.

Mr. Tormes: We take exception.

Judge: I say this so that in case some briefs are filed these questions should be treated, bearing in mind the jurisprudence, the law and the doctrine that each party may deem necessary. It

is a notice and the question in this connection is not closed. This evidence for the plaintiff is not definitely closed.

Attorney Ochoteco: We proceed to offer in evidence certified copy of deed number 30, which is a voluntary mortgage of Mrs. Elvira Olivieri-Commins and Mr. Manuel Francisco Lluberas Pasarell, executed before notary Luis Lopez-de-Victoria.

Mr. Tormes: Said deed has been examined by defendants Lluberas and Blasini.

Attorney Sabater: No objection from us.

Attorney Tormes: No objection.

Judge: It is admitted and marked Exhibit G.

[The paper submitted and admitted in evidence as Exhibit G of Plaintiff is faithfully and correctly transcribed and is attached as a separate paper at the end of this transcript as "Exhibit G of the Plaintiff."]

Attorney Ochoteco: We miss the notice of assignment. Was this notice submitted as evidence at the trial of the ejectment proceeding?

Attorney Tormes: I think so.

Judge: Then let them look for it in the record of the ejectment proceedings. The clerk informs that the search of that notice is proceeding with in the office of the clerk. Let us hear some other evidence, if any.

Attorney Ochoteco: Yes, sir. We submit in evidence receipt number 702 issued by the clerk of this court on April 8, 1937, in favor of Mario Mercado e Hijos for $45,359.50, in connection with civil case number 310 *in re* depositing of money in court.

Attorney Tormes: Notice is taken of the receipt.

Attorney Sabater: The same.

Attorney Tormes: I am going to object because it is irrelevant immaterial, redundant and unnecessary matter for the purpose of the question, and moreover because the saffne is self-serving evidence. It is an act of Mario Mercado e Hijos depositing 45,000 and odd dollars in this court without being entitled thereto. That is the objection.

Attorney Sabater: We object to this paper on the ground that it is sought to introduce this paper in evidence in order to bring later on and submit the action *in re* deposit of money in court, because it is our opinion that the action *in re* deposit of money in court and the tender of such amount ought to have been made within this action, *in re* rescission of contract.

Attorney Ochoteco: We want to state that this receipt is only submitted by us for the purpose of proving that we deposited at the time referred to in the receipt the sum of 45,000 and odd dollars. We have not yet submitted the proceedings *in re* deposit of money in court, and it seems that the objection from my colleague covers not only the action *in re* deposit of money in court but the receipt itself.

Judge: Both things seem to be mutually connected, but the record of the suit is not here yet. This other question is also connected with the former, that is why the court admits it so as to have an opportunity to more carefully consider this point. It is admitted and will be accorded any probatory value that it may have.

Attorney Tormes: We take exception.

Judge: Let it be marked Exhibit H.

[The paper submitted and admitted in evidence as Exhibit H of the Plaintiff, is faithfully and correctly transcribed and is attached at the end of this transcript as "Exhibit H of the Plaintiff."]

Attorney Sabater: We take exception.

Judge: Let it be recorded and marked Exhibit H of the Plaintiff.

Attorney Ochoteco: We submit in evidence verified copy of deed number 47 of March 8, 1937, executed before notary Fernando Zapater-Martinez, *in re* cancellation of mortgage, executed by Mrs. Belen Gonzalez-Salicrup, widow of Tous-Soto, et al.

Judge: The other party?

Attorney Tormes: Notice taken.

Attorney Sabater: Notice taken of the paper.

Judge: Any objection?

Attorney Tormes: What is the number of this deed?

Attorney Ochoteco: Number 47, of March 8, 1937, executed before Fernando Zapater-Martinez.

Attorney Tormes: Our only objection is that it contains no mention of its entry in the Registry of Property.

Judge: Then the court admits it—

Attorney Sabater: No objection.

Judge: The same is admitted and let it be marked Exhibit I of Plaintiff. It is admitted, and proceed.

[The paper submitted and admitted in evidence as Exhibit I of the Plaintiff is faithfully and correctly transcribed and is attached as a separate paper as "Exhibit I of Plaintiff."]

Attorney Ochoteco: I move the court for a five minute recess so that we might examine some other evidence.

[Recess of the court.]

Judge: The session of the court is opened. Let us proceed with the case and the submission of evidence.

Attorney: We will proceed with the submission of documentary evidence. We submit in evidence a verified copy of deed number 13 of March 23, 1932, executed before notary Fernando Zapater-Martinez, acting in the place of notary Jose Tous-Soto, *in re* voluntary mortgage, executed between Mrs. Elvira Olivieri-Commins and Mr. Arturo Cortes-Vals.

Attorney Tormes: I think that a deed in that respect has already been submitted.

Attorney Ochoteco: No.

Attorney Sabater: No objection.

Judge: No objection?

Attorney Tormes: None.

Judge: Let it be marked Exhibit J of Plaintiff.

[The paper submitted and admitted in evidence as Exhibit J of Plaintiff is faithfully and correctly transcribed and is attached at the end of this transcript as "Exhibit J of Plaintiff".]

Attorney Ochoteco: It is attached to record number 310, *in re* deposit of money in this court.

Judge: Is it in the record of the proceeding *in re* deposit of money in court?

Attorney Ochoteco: We intend to submit part of that record in evidence.

Judge: What is the number of that record?

Attorney Ochoteco: 310. We submit in evidence a verified copy of deed number 7 of April 6, 1937, executed before notary Pedro M. Porrata, *in re:* the demand, attached to record number 310 itself, *in re* deposit of money in court.

Attorney Tormes: The paper is examined and I will object to it.

Attorney Sabater: We also object.

Attorney Tormes: We object to the submission of this paper because it is immaterial and irrelevant as evidence for the purpose of the action prosecuted by the plaintiff and because it constitutes self-serving evidence, and these are our grounds for the present.

Judge: The other defendant.

Attorney Sabater: We object on the same grounds.

Judge: The court admits the same and will give it any value that it may have in connection with the remaining evidence and is marked Exhibit K of Plaintiff.

Attorney Tormes: Exception taken.

Attorney Sabater: Exception taken.

[The paper submitted and admitted in evidence as Exhibit K of the Plaintiff, is faithfully and correctly transcribed and is attached at the end of this transcript as "Exhibit K of the Plaintiff".]

Attorney Ochoteco: We submit in evidence the aforesaid record civil number 310 of this court, *Mario Mercado e Hijos* v. *Elvira Olivieri-Commins, in re* deposit of money in court.

Judge: Is that the record that was being searched?

Attorney Ochoteco: Yes, sir. The following proceedings from record 310—

Judge: Of record 310?

Attorney Ochoteco: Yes, sir. Original complaint and amended complaint. For the purpose of the record, would the defendant object to admit that the plaintiff has entered an appearance, that it has appeared in the case?

Attorney Tormes: If that is a fact, how can we refute it? We would like the whole record to be submitted so that the judge might have everything before him.

Judge: The complaint, the original complaint is admitted and is marked—

Attorney Tormes: I object.

Attorney Ochoteco: The receipt of the deposit of money in court was submitted in evidence.

Judge: It was admitted as Exhibit H.

Attorney Sabater: I think a small doubt existed.

Judge: It was admitted and the statement from the court was in connection with the deposit of money in court.

Attorney Sabater: We are going to object to the admission of the record of the proceeding of deposit of money in court.

Judge: There is a complaint and an amended complaint.

Attorney Sabater: We object to the admission in evidence of the complaint and of the amended complaint in civil case number 310, *in re* deposit of money in court, on the following ground: our Code of Civil Procedure in force does not contain any provision authorizing complaints or ordinary actions *in re* deposit of money in court. The deposit of money in court is an *ex parte* proceeding and no complaints in deposit of money in court proceeding of a contentious nature can be filed.

The Supreme Court of Puerto Rico has held repeatedly that where there is no proceeding or remedy in the Code of Civil Procedure, resort may be had to the Spanish Code of Civil Procedure, that is, the Spanish law in force in Puerto Rico. This is why, in our opinion, there should not be admitted in evidence regarding

the deposit of money in court proceeding the complaint and the amended complaint submitted by my colleague.

[Attorney Sabater argues at length on his objection.]

Judge: Cite legal provisions.

Attorney Sabater: Our objection rests on the provisions of the Spanish Law of Civil Procedure, title 19, dealing with redemption, and Section 1618 *et seq.*, treating of the redemption proceeding, with which the complaint and the amended complaint are concerned, sought to be admitted in evidence by the attorney for the plaintiff.

[Attorney Sabater argues the point.]

Judge: The court understands very well the objection made, but the point is that two legal systems are facing each other, that of the Spanish Law of Civil Procedure and the American system of procedure in force in our Code of Civil Procedure. In the Spanish Law of Civil Procedure there was a proceeding for each action with the steps and rules respectively set out, and according to our procedure an ordinary remedy and even extraordinary remedies may be prosecuted in an ordinary action. This is why the courts cannot determine whether the provisions of the Spanish civil procedure shall prevail, and for said reasons the court admits the evidence in question.

Attorney Sabater: We take exception.

Judge: Let the complaint be marked Exhibit L and the amended complaint ~~Exhibit M.~~

Attorney Sabater: We take exception in behalf of the party represented by us.

Attorney Tormes: Then, will they be two exhibits, because they are not separated?

Judge: Yes.

Attorney Tormes: We take exception on grounds similar to those stated by our colleague in taking objection.

Judge: Let it be so recorded. Any other documentary evidence?

Attorney Ochoteco: This is all the evidence which we submit

for the present. We will submit the other documentary evidence during the testimony of the witnesses.

Now, I think, with due respect to the better judgment of the court, that it is now 4:50 P.M., and as the examination of the next witness would be somewhat long, and would have to be interrupted, I would ask the court to order a recess.

Judge: The court will adjourn to tomorrow at nine A.M. The court is adjourned.

[Recess of the court.]

SESSION OF NOVEMBER 14, 1939.

[The clerk of the court reads the minutes of the preceding session.]

Judge: Minutes approved. The minutes of the preceding session is read, approved and signed. The hearing of civil case number 311, *Mario Mercado e Hijos* v. *Elviro Olivieri Commins, in re* rescission of contract, is proceeded with. Plaintiff's evidence.

Attorney Ochoteco: For the purpose of the record, we would like the marshal to inform us about the return of the summons to be served on Mr. Rafael Barleta, delivered to said officer.

Marshal: On Tuesday of last week I went to Yauco to summons Mrs. Elvira Olivieri-Commins, Mr. Manuel Francisco Lluberas and Mr. Emilio Blasini, and once there I requested the marshal to serve the summons on Mr. Barletta, but failed to find him at home because he was abroad on the Island, and I then left the summons with him. I called again and I was told that they had been unable to locate Mr. Barletta, and today the summons was returned to me without being served because they had not been able to locate Mr. Barletta.

Judge: Was it returned?

Marshal: With the following letter:

"My dear Friend Morales:

"It has been impossible to locate Barletta. We have been taking steps until now, 8:45, P.M., Saturday.

"On Monday I will return to you the stamps left by you with us.

"Yours sincerely,

"J. M. FREYRE."

Judge: Who is he?

Marshal: Deputy marshal of the District Court of Mayaguez.

Attorney Ochoteco: Does Mr. Barletta live in Mayaguez? *A.* Yes, sir.

Q. Does the marshal know it of his own knowledge? *A.* Yes, sir.

Attorney Ochoteco: I will ask the court to issue the proper writ directed to the marshal of the District Court of Malaguez to serve the summons in question. As the present proceedings will surely last the whole of this day, we would like to locate Mr. Barletta, if possible.

Judge: What is it you actually want?

Attorney Ochoteco: That instructions be given to the marshal of the District Court of Mayaguez to proceed to summon Mr. Rafael Barletta to appear herein and take the stand for the plaintiff, the plaintiff being willing to pay for any disbursements made by Mr. Barletta that might be authorized by law.

Judge: Then let the marshal proceed accordingly. Let the summons be issued for his appearance today before three P.M.

Attorney Ochoteco: And if that cannot be, for tomorrow at nine A.M.

Judge: Could not we close today?

Attorney Ochoteco: Hardly.

Judge: Then let us be short.

Attorney Ochoteco: Mrs.—

SWORN TESTIMONY OF ELVIRA OLIVIERI-COMMINS.

Judge: Do you feel comfortable there?

Mrs. Olivieri: Very well, thank you.

Judge: Listen well to the questions, be calm and answer at your ease.

Attorney Ochoteco: What is your name?

Mrs. Olivieri: Elvira Olivieri.

Q. Where do you live? *A.* In Yauco.

Q. Since when do you live in Yauco? *A.* Since the month of March, 1938.

Q. Prior to the month of March, 1938, where did you live? *A.* In Mayaguez.

Attorney Ochoteco: With whom?

Mrs. Olivieri: With my daughter, Eurosina Blasini-de-Barletta.

Q. Single or married? *A.* Married to Mr. Barletta.

Judge: Did you reside in Mayaguez? *A.* Yes, sir.

Attorney Ochoteco: When was it that you moved from Mayaguez to live in Yauco? *A.* In March, 1938.

Q. And you said that you lived in Mayaguez together with your daughter? *A.* Yes, sir.

Q. What did you say her name is? *A.* Eurosina Blasini-de-Barletta, married to Rafael Barletta.

Q. How long did Rafael Barletta and his wife reside— *A.* Almost twenty-four years between the United States and Mayaguez.

Judge: What is the name of Mr. Barletta?

Attorney Ochoteco: Rafael. How long have you known Mr. Barletta?

Mrs. Olivieri: Ever since he met and married my daughter.

Attorney Ochoteco: More or less, how long since your daughter was married? *A.* About— I do not remember quite well. About thirty years more or less. Perhaps that long.

Q. Do you know, or have you had any dealings with, Mario Mercado e Hijos? *A.* Yes, sir.

Q. How long? *A.* About 35 or 56 [*sic*] years.

Q. What kind of dealings? *A.* Matter of properties that I had leased to them.

Q. Properties belonging to you? *A.* Yes, sir. First to my mother and afterwards to me.

Q. And have you had them leased? *A.* Yes, sir.

Q. And approximately how long has it been since then? *A.* Thirty-five to thirty-six years.

Q. Have you had any dealings with that firm? *A.* Yes, sir.

Attorney Ochoteco: Do you know Mr. Peralta?

Mrs. Olivieri: I know him.

Q. Do you know what position he holds with the firm Mario Mercado e Hijos? *A.* Manager.

Q. Please examine this document.

[The witness examines a paper shown her by Mr. Ochoteco.]

Attorney Tormes: Paper examined.

Attorney Ochoteco: If you wish I can read it to you:

"January 23, 1936. Mario Mercado e Hijos, Guayanilla. Received offers through my son-in-law. Will answer next week through Rafael.

(signed) ELVIRA OLIVIERI-COMMINS."

A. Yes, sir.

Q. What kind of paper is this? *A.* This is a telegram; as we were about to lease and sell to that firm—

Q. Did you wire it to Mario Mercado e Hijos? *A.* My son-in-law did, he was in charge; I told him to submit the proposals.

Q. Please speak a little louder, so that the stenographer can hear you well and take down all your words.

Mrs. Olivieri: The proposals were from me.

Attorney Ochoteco: Then the proposal came from you? *A.* Yes, sir, through my son-in-law.

Q. Who is your son-in-law? *A.* Rafael Barletta, with whom I sent the note. He took it, and if the answer was agreeable to me, then I might accept, but if the answer from Rufina did not suit me, I would say: "This does not suit me." He had no power to decide; I was the owner, the one who disposed and ordered and did everything. Do you understand me?

Q. Do you wish to say anything further? *A.* That is all.

Q. I am going to beg the lady hereafter to restrict her answers to the questions put by me. Why did you delegate Mr. Rafael

Barletta? *A.* Because my children were busy in their professional occupations. He was the one who could help me in this business, but I never authorized him to do anything further.

Q. I am not talking about any power. My question is why did you avail yourself of Mr. Rafael Barletta?

Mrs. Olivieri: Because at that time I trusted him to do any business that I might entrust him with.

Attorney Ochoteco: What business? *A.* The proposal to lease and sell made by me to Mario Mercado e Hijos.

Q. Do you refer to the proposal to sell and lease your property to Mario Mercado e Hijos? *A.* Yes, sir.

Q. This is what matters us. *A.* And that is what I care to answer.

Q. Did you ever expressly authorize Mr. Barletta to discuss the lease or sale of your properties "Indios" and "Juanita"?

Attorney Tormes: She answered to that. The direct examination would never come to an end.

Attorney Ochoteco: May it please the court. Now I am going to make some statements covering all the lady's testimony. The lady is my witness, and may, of course, be examined with the consent of the defendant, and although she is defendant, she is under our protection, if any is needed. The question made by us to her is specific as regards certain parcels. The former ones were general questions. Let us take up now, specifically the parcel known as "Juanita".

Judge: The court understands. Such specific question is admitted.

Attorney Ochoteco: What does the lady answer?

[The stenographer repeats the question which gave rise to the above incident.]

Stenographer [reading the question]:

"Did you ever expressly authorize Mr. Barletta to discuss the lease or sale of your properties 'Indios' and 'Juanita'?"

Mrs. Olivieri: Yes, sir.

Attorney Ochoteco: When? *A.* I do not remember when.

Q. Please try to refresh your memory and see if you can remember when. *A.* May be it was in 1936, but I do not remember the day and the hour.

Q. I am not asking you about either the day or the hour. *A.* In 1936, but I cannot tell you whether it was in January or February. I do not remember. About the date of the telegram—I was going to say to you—

Judge: She says that in 1936.

Attorney Ochoteco: The telegram is dated January 23, 1936.

Mrs. Olivieri: On several occasions I myself wrote to Central Rufina.

Q. In order to gain time, please restrict your answers to my questions. *A.* I am not well posted on many things.

Q. Was it in January 1936 when you empowered him? *A.* Empower, not. I authorized him: "Go to Rufina and make this proposal." I gave him a memorandum. This was about January, 1936.

Q. Right after this telegram? *A.* Yes, sir.

Q. We submit in evidence the telegram.

Attorney Tormes: No objection.

Mrs. Olivieri: I wish to see the telegram.

Attorney Ochoteco: I pray the lady to confine herself only to answer the questions put by me.

Judge: Please wait until the telegram is produced, so you can talk afterwards, because we have to speak slowly and only one person must speak at a time. What does the telegram say?

Attorney Ochoteco: A telegram of January 23, 1936, from Elvira Olivieri-Commins to Mario Mercado e Hijos, identified by her.

Attorney Tormes: No objection.

Judge: Admitted and marked Exhibit N.

[The document submitted and admitted in evidence as Plaintiff's Exhibit N is faithfully and correctly transcribed,

and attached as a separate paper at the end of this transcript, marked "Plaintiff's Exhibit N".]

Attorney Ochoteco: Do you know if Mr. Barletta had interviews with Mario Mercado e Hijos in connection with the lease of the parcels above mentioned?

Mrs. Olivieri: I do not think so prior to this telegram.

Q. Do you know if Mr. Barletta had any interview with Mario Mercado e Hijos in connection with that errand? *A.* I think so.

Q. Do you know that of your own knowledge?

Mrs. Olivieri: I think so, because once he brought me a note from the Central Rufina, and I think I have it.

Attorney Ochoteco: Did he bring you certain details about the Central Rufina, which showed that he had been there? *A.* Yes, sir.

Q. How many proposals, if any, from Mario Mercado e Hijos did Mr. Barletta bring you, in connection with the lease or sale of these properties? *A.* The only proposal is the one I have at home; that is the only one I remember of, where they told me—

Q. Please do not say what the paper said. *A.* I have to explain. They were proposals which I did not accept.

Judge: Do you say you have one? *A.* One, and as to the others I do not remember whether I tore them.

Attorney Ochoteco: So that of your own knowledge, you remember that at least one proposal reached you? *A.* Yes, sir.

Q. In which Mario Mercado e Hijos wanted to lease or purchase those parcels?

Mrs. Olivieri: Yes, sir.

Attorney Ochoteco: Do not you remember whether there were more than one proposal? *A.* They were three proposals.

Q. Were they three? *A.* Yes, sir.

Q. Were these three written or verbal proposals? *A.* This is the only one I have at home.

Q. Were the others verbally made? *A.* Yes, sir.

Q. Through Mr. Barletta? *A.* Yes, sir.

Q. Were such proposals for the lease and sale of the parcels,

or for the sale only, or for the lease only? *A.* For the lease, and I do not remember whether they were for the sale.

Q. Please try to remember. *A.* For the sale also.

Q. For the sale also? *A.* Yes, sir. I remember that I verbally asked Rufina (and I must say it, so that you can know it) forty-five thousand dollars as the purchase price; I asked that for the lands that Lluberas purchased afterwards, and they offered $28,000 and four hundred which (I am not sure, as my memory fails me) I owed on such land, and I said: "I cannot sell my lands at such a bargain price." I told my son-in-law: "Please go and tell them that I refuse the offer."

Attorney Ochoteco: You mean that Messrs. Lluberas offered you $45,000?

Mrs. Olivieri: No, I could not say that. At that time I had not talked with the Lluberas.

Q. You say that Mario Mercado e Hijos offered to purchase for twenty-thousand odd dollars? *A.* Twenty-eight thousand dollars for the whole land, for land that comprised one hundred thirty-six cuerdas of sugar cane, and four or five hundred of pastures.

Q. And you did not accept that offer? *A.* No, sir.

Q. Because it was low? *A.* Yes, sir.

Q. Then, if I have not misunderstood you, was it not your son-in-law, Mr. Barletta, the person commissioned to make the deal? *A.* Yes, sir.

Q. But that you advised Mario Mercado e Hijos that you refused?

Mrs. Olivieri: Yes, sir.

Attorney Ochoteco: Did you not in turn make Mario Mercado e Hijos any counter offer? *A.* I told Barletta, "Nothing doing on such terms. Let us look elsewhere."

Q. Did you look elsewhere? *A.* In 1938 we started to hustle—

Q. Who are "we"? *A.* I, Mr. Barletta and my children; the family. We had to hustle so as to get rid of those worries that were driving me crazy.

Q. Then it was not until 1938 that you began to hustle? *A.* More or less. I cannot tell you exactly.

Q. Was not it in 1937? *A.* Yes, I think it was in 1937.

Q. Do you think so. *A.* Yes, sir.

Judge: Instead of the year 1938, it was 1937? *A.* I do not remember exactly.

Q. 1937? *A.* I think so.

Attorney Ochoteco: Try to remember if it was in 1937 or in 1938.

Mrs. Olivieri: I think it was in 1937.

Attorney Ochoteco: Was it at the beginning or at the middle of the year 1937? *A.* I do not remember.

Q. Do you remember, madam, if you leased one of the properties to which you have referred in your testimony, and sold the other about the year 1937? *A.* One of them was leased.

Q. Did you sell another? *A.* I sold another, but I do not remember the date, the year.

Q. I am not asking you about the dates. *A.* I am telling you, please—

Judge: Another question.

Attorney Ochoteco: The talks you had, the several talks you had with Mr. Barletta, in connection with the offer of Mario Mercado e Hijos, did they always take place before you sold or leased your parcels? *A.* Yes, sir, of course.

Q. You say that you do not remember the date on which you sold nor when you leased?

Mrs. Olivieri: Messrs. Blasini and Lluberas—

Attorney Ochoteco: Do you or do you not remember? *A.* I think it was in March, 1938. I do not have,—I think it was in March, 1938.

Attorney Sabater: May it please the court, Mr. Blasini, who is a doctor, wishes to feel his mother's pulse.

Mr. Blasini: May it please the court, I would like to feel my mother's pulse, due to the fact that she is not in good health.

Judge: Very well. You may rest as long as you wish.

Attorney Ochoteco: Please the court, we move for a recess.

Judge: Then the court declares a few minutes recess. A recess will be declared each time the lady needs it, and the lady shall be treated with every consideration. Then the court declares a recess.

[Recess of the court.]

Judge: Let us proceed with the hearing of civil case number 311.

Attorney Ochoteco: Will the stenographer be kind enough to repeat the last question put by me before the recess?

Stenographer [reading from his notes]:

"You say that you do not remember the date on which you sold nor when you leased?"

Judge: I warn counsels for both sides to be as brief as possible.

Attorney Ochoteco: According to the deed before me, did you sell to Messrs. Lluberas and Blasini on March 9, 1937?

Mrs. Olivieri: Yes, sir. I think so.

Q. How long, madam, more or less were you in negotiations with Mario Mercado e Hijos in connection with the sale or lease of the estates to which you have referred in your testimony? More or less, how long? *A.* I think it was in '36, but I do not remember now the date.

Q. Was it months, days or weeks? *A.* I think it was weeks.

Attorney Ochoteco: How long were you in negotiations with Mr. Manuel Francisco Lluberas-Passarell and Mrs. Antonia Lluberas-Passarell, etc., with the people to whom you sold; how long were you in negotiations with them?

Mrs. Olivieri: I do not remember. What I want is to explain to you if you allow me.

Q. The question is how long. *A.* I do not remember how long. I do not remember whether it was days.

Q. Was it a few days or many days? *A.* I think it was a few days, I do not remember well.

Q. For the purpose of refreshing your memory, do you remember having testified before this District Court of Ponce in any

ejectment proceedings brought by Messrs. Lluberas against Mario Mercado e Hijos? *A.* Yes, sir. I remember. I remember that I came to testify.

Q. Did you come to testify as a witness? *A.* Yes, sir.

Q. Do you remember whether that took place about the 23d of February, 1938? *A.* I do not remember.

Attorney Ochoteco: But was it on the day of the trial?

Mrs. Olivieri: Yes, sir. On that day. On the day of the trial, but I do not remember exactly the date.

Q. Can you remember whether I, who was the attorney examining in that case, was putting questions to you while you were on the stand, in the other court room before Judge Todd? *A.* Yes, sir. You were putting those questions to me.

Q. Do you remember, madam, whether the following question was put to you in that case: "How long were you in negotiations for the sale of the estate to the Heirs of Lluberas?" and your answer was: "For many days." Do you remember that? *A.* I do not remember.

Q. You do not remember having made that statement? *A.* I do not remember.

Q. Did you testify that it was many days? *A.* I do not remember.

Q. Prior to the day when finally the deal was closed with Lluberas, for how many days previously had you been in negotiations with Messrs. Lluberas?

Attorney Tormes: She has already stated that she did not remember.

Mrs. Olivieri: I do not remember.

Attorney Tormes: She has already stated that she did not remember.

Attorney Ochoteco: It is a different question.

Attorney Tormes: I am going to object. I would like to know what my colleague has in mind, so as to make an objection then in order to raise a legal question.

Attorney Ochoteco: My aim is to prove the essential averments

of the complaint herein. Now, adhering to the theory of our Supreme Court, I say that we are not bound under any circumstances to tell my colleague the particulars which we want to show by means of the witness. He will know when the witness leaves the stand. Now, the court will decide inasmuch as for the present I am examining one of our witnesses.

Attorney Tormes: Then, in accordance with the averments of the complaint, and in accordance with the evidence here submitted by the plaintiff, we think with the leave of the court that the plaintiffs are estopped from bringing before this court any evidence to disprove the authentic instruments submitted in evidence, and we are in our purpose supported by Sections 1, 2, and 3, better expressed, subdivisions 1, 2, and 3 of Section 101 of the Law of Evidence, which read as follows:

> "The following presumptions, and no others, are deemed conclusive:
>
> "1. A malicious and guilty intent from the deliberate commission of an unlawful act, for the purpose of injuring another.
>
> "2. The truth of the facts recited, from the recital in a written instrument between the parties thereto or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.
>
> "3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Judge: Where the word "compensacion" appears it must be read "consideracion". The English text says "consideration".

Attorney Tormes: Later on I am going to refer to certain papers submitted in evidence. It is sought to refute the plaintiff, what she did of her own will. There appears in evidence the deed of mortgage cancellation number 8 executed on March 7, 1937,

and which was marked Exhibit I of Plaintiff; admitted without objection. From this deed your Honor will see that Mrs. Belen Gonzalez-Salicrup, widow of Tous-Soto, and her children, bought from Mario Mercado e Hijos a mortgage credit amounting to $41,000 owed by the defendant lady to Mario Mercado e Hijos.

[Attorney Tormes argues at length on his objection.]

Attorney Ochoteco: The legal provisions of the Law of Evidence cited by my colleague are not applicable. There is a confusion in the terms and concepts in this case.

[Attorney Ochoteco argues thereon.]

Attorney Sabater: I want to record my objection to any further testimony given by the witness on the same grounds set forth by my associated colleague, and moreover on the ground that nowhere in the complaint of Mario Mercado e Hijos does it appear that it has been alleged that the mortgage credit assigned to the heirs of Tous-Soto has been cancelled. How can the witness be examined regarding the cancellation of such mortgage credit if the point does not appear in the complaint as having been alleged?

[Attorney Sabater argues thereon.]

Attorney Ochoteco: We submit the question.

Judge: This is the same question as yesterday's. Yesterday this aspect of the case was discussed at length. The court thinks that it is admissible within the theory of the case and that it has been amply discussed. The court admits the question within the theory submitted for determination.

Attorney Tormes: We take exception.

Attorney Sabater: We respectfully take exception.

Attorney Ochoteco: We pray the stenographer to repeat the question.

Stenographer [reading from his notes]:

> "Prior to the day when finally the deal was closed with Lluberas, for how many days previously had you been in negotiations with Messrs. Lluberas?"

Attorney Ochoteco: Kindly answer.

Mrs. Olivieri: I do not remember the days, but what I do remember is that I said to Chito: "Do not talk about business, because until the mortgage is cancelled I cannot talk about business. With neither one nor the other. We will take up negotiations for the sale or the lease, but not until the debt is settled."

Q. Whom does the lady mean by Chito? *A.* Francisco Lluberas.

Q. You said that when you were talking to Chito, and whom else? *A.* Blasini.

Q. Did you say to him that until the mortgage was paid, you were not in a position to do the business? *A.* Yes, sir.

Q. To Mr. Lluberas and to Mr. Blasini? *A.* Yes, sir.

Q. And to which mortgage were you referring when talking to them? *A.* To the mortgage of the widow of Tous-Soto.

Q. That is, that so long as the mortgage was alive, without being paid, you could neither sell nor lease by reason of the existing option to purchase?

Mrs. Olivieri: On account of the mortgage which I owed to that lady and that money I could not do any business until it was paid.

Attorney Ochoteco: Why could not you do it? *A.* Because I was not in a position to do so nor did I want to talk until the debt was paid. After paying the debt I would talk about selling or leasing.

Q. Then, Messrs. Lluberas and Mr. Francisco Lluberas and Mr. Blasini approached you when the mortgage was paid? *A.* They approached me when the same was paid.

Judge: You had better heard the whole question. *A.* I do not quite follow.

Attorney Ochoteco: A short while ago you testified here that more or less you were telling Lluberas and Blasini that you could not close any deal in regard to the sale or lease of the property until the mortgage to the widow of Tous-Soto was paid? *A.* Yes, sir.

Attorney Ochoteco: When you were making those statements

to Messrs. Lluberas and Blasini, the mortgage due to the widow of Tous-Soto was not yet cancelled?

Mrs. Olivieri: It was not cancelled.

Q. And why did you say to Messrs. Lluberas and Blasini, when the mortgage to the widow of Tous-Soto was not cancelled, that until such mortgage was cancelled you could not entertain proposals for the sale or lease of those estates? *A.* Because they had made me an offer to purchase and lease and I would say to them: "We must not talk about this until the debt is settled."

Q. When you say that they made an offer to you to purchase and lease, what did Lluberas offer to you: to purchase or to lease? *A.* To purchase.

Q. And what did Blasini offer to you? *A.* To lease.

Q. Try to refresh your memory, madam. Let us see whether you can say positively about how many days (I do not ask you the exact number of days), how many days prior to the settlement by you to the widow of Tous-Soto; to the settlement of the mortgage, was it that you told Messrs. Lluberas and Mr. Blasini that you could not either sell or lease until the mortgage was settled?

Mrs. Olivieri: I do not remember the number of days.

Attorney Ochoteco: More or less? *A.* I cannot remember; may be 5, 6, 10; I do not remember.

Q. How many times Messrs. Blasini and Lluberas made offer to lease and to purchase? *A.* Once or twice.

Q. While the mortgage was still in force? *A.* Yes, sir.

Q. Madam, when you decided to accept the offer from Messrs. Lluberas and Blasini to purchase and lease those estates from you; when you had already made up your mind to sell and to lease, did you notify Mario Mercado e Hijos that you had received such offer to purchase and lease, by registered mail? *A.* No. My nephew Millo Blasini called on me—

Q. Mr. Emilio— *A.* Yes, sir. And he said to me: "Aunt Elvira, the mortgage has been paid up and I bring you here the promissory notes."

Attorney Ochoteco: That will do.

Attorney Tormes: Let her explain.

Judge: The fact is recorded that she draws out some paper.

Mrs. Olivieri: He then said to me: "Here are the promissory notes, the mortgage is already settled; now, let us see whether we can talk about the lease and the sale." Then that night we talked about the lease, and I said to him: "Tell Chito to call on me tomorrow with the deed ready, in order to talk about the sale. That for one thousand or five thousand dollars more or less, we will always come to an agreement." And the next day Chito called to sign the deed.

Attorney Ochoteco: My question has not been yet answered, though I am obliged for all your statements. My question is as follows: whether you notified Mario Mercado e Hijos by letter or registered mail that you had an offer of purchase and lease from Messrs. Lluberas and Blasini.

Attorney Tormes: We object to the question as immaterial and irrelevant, inasmuch as she was under no obligation to notify, because Mario Mercado e Hijos held no interest in the mortgage, and the option clause was in favor of the widow of Tous-Soto and her children.

[Attorney Tormes argues thereon.]

Judge: She had already answered the question at the start and went on explaining. The question has already been answered. The question is admitted, of course.

Attorney Tormes: We take exception.

Attorney Sabater: We make a similar objection and take the same exception.

Attorney Ochoteco: Will the stenographer be kind enough to read the preceding question?

Stenographer [reading from his notes]:

> "My question has not been yet answered, though I am obliged for all your statements. My question is as follows: whether you notified Mario Mercado e Hijos by letter or registered mail that you had an offer of purchase and lease from Messrs. Lluberas and Blasini."

Mrs. Olivieri: My answer is: I did not have either to answer them or to write them.

Attorney Ochoteco: That is not an answer to my question.

Judge: What is the answer to the question?

Mrs. Olivieri: No.

Q. Now you may explain why you did not do it. *A.* The explanation is very simple. The explanation is that I did not have to write them by registered mail, because I owed them nothing. The indebtedness was to Mrs. Tous-Soto.

Q. Please proceed.

Attorney Ochoteco: Did not you notify them verbally either? *A.* No, not at all, because—

Q. If my memory does not fail me, madam, and each time that I make a statement which is not true, I beg of you to call my attention; if my memory does not fail me; you said that on the night of the day when you cancelled the mortgage of the widow of Tous-Soto, Mr. Blasini called at your house to execute a deed of lease? *A.* Yes, sir.

Q. Was it so? *A.* Yes, sir, not in the same words.

Attorney Tormes: That is what my brother attorney says.

Attorney Ochoteco: I beg my brother attorney to go on with this case as we have done up to the present. Of course, if the lady does not understand—

Mrs. Olivieri: I fairly understand; I fairly understand what it is about.

Judge: That is as far as she is concerned.

Attorney Ochoteco: To discuss or to settle the contract of lease? *A.* Yes, sir.

Judge: To settle. Is "to settle" the word? *A.* Yes, sir.

Q. What is the answer? *A.* Concerning the lease.

Attorney Ochoteco: Was it on that night? *A.* Yes, sir.

Judge: The question has been answered.

Attorney Ochoteco: And if my memory does not fail me, madam, I heard you say that on that very night . . . Was not the

lease contract closed, the lease contract with Mr. Blasini, on that night?

Mrs. Olivieri: Yes, sir.

Attorney Ochoteco: Verbally, I mean. *A.* Yes, sir. Verbally.

Q. Then, did you tell Mr. Blasini to tell Mr. Lluberas to prepare the deed? *A.* Yes, sir. For the sale.

Q. That talk, that is, that meeting between you and Mr. Blasini took place in Mayaguez, if I understand right. *A.* Yes, sir.

Q. In the house of Mr. Barletta, where you were residing? *A.* Yes, sir.

Q. What did you do the next day? *A.* The deed was executed and the price stipulated was $40,000, which Mr. Lluberas paid me.

Q. You, of course, did not notify either this lease and sale deal or proposals to lease and purchase which were subsequently carried out, to the widow of Mr. Tous-Soto. *A.* No, why should I?

Attorney Ochoteco: Madam, which of your two estates was involved—

Mrs. Olivieri: The estates are known as "Indios" and "Juanita".

Q. What is the name of the one sold by you to Lluberas? *A.* "Indios."

Q. What is the name of the one you leased to Blasini? *A.* "Juanita."

Q. Which of the two estates was worth more, "Indios" or "Juanita", at the time you closed the above deals, those transactions, I mean actual value, if you know it? *A.* I do not quite understand that question about actual value, but I estimated "Indios" to be worth $40,000. I was very much attached to that estate, as I stated in the other testimony.

Q. Are you referring to what you testified in the ejectment proceedings? *A.* Yes, sir. I was very much attached to it.

Q. Which is the larger of the two estates? *A.* "Juanita."

Q. Better land?

Mrs. Olivieri: Both are the same.

Attorney Ochoteco: The same kind of land? *A.* Yes, sir.

Q. Which of the two had more canes planted? *A.* "Juanita."

Q. A great deal more? *A.* A great deal more, and grazing land also.

Q. Did you borrow from Mr. Manuel Francisco Lluberas-Pasarell on February 25, 1937, money on a mortgage? *A.* Yes, sir.

Q. How much did you borrow? *A.* Five thousand dollars.

Q. Are you sure? *A.* Yes, sir.

Q. In February, 1937? *A.* Yes, sir. $5,000 on a mortgage on "Juanita".

Q. When was it that you borrowed the $45,000? *A.* I do not remember the date. The deed ought to be there. Look it up, please.

Q. It appears from a deed executed before notary Luis Lopez-de-Victoria on February 23, 1937, that you borrowed on a mortgage from Mr. Francisco Lluberas-Pasarell— When was it that Mr. Manuel Francisco Lluberas-Pasarell lent you that $45,000?

Mrs. Olivieri: I do not remember. Did not you say that it was in February?

Attorney Ochoteco: According to the deed it was on February 25, 1937. *A.* That must be the date because it is so stated in the deed.

Q. Would it be about that time, more or less? Do not you remember whether it was on that day that the deed was executed? *A.* I do not remember.

Q. Did he deliver that money to you, madam, that $45,000 which you admitted to have received from him? *A.* He did not deliver it personally, as I instructed him, by power of attorney, to pay to the widow of Tous-Soto the forty-one thousand and odd dollars. I so instructed him, of course, and I had to execute a mortgage to him. I had to secure the money lent by him to me by a mortgage. Do you understand me? Am I clear? I then instructed him, executed a power of attorney to him and said to him: "Please call on the widow of Tous-Soto and pay her."

Attorney Ochoteco: In other words, that he should keep the

money in his possession in order to pay to the widow of Mr. Tous-Soto the money that you owed her upon a mortgage?

Mrs. Olivieri: Yes, sir. That is so.

Q. And how much did he pay the widow of Tous-Soto? *A.* Forty-one thousand dollars.

Q. Was not the mortgage for $45,000? *A.* There was a balance which he delivered to me.

Q. Did he deliver the balance to you? *A.* Of course.

Q. Is Mr. Emilio Blasini related to you? *A.* Yes, sir. He is my nephew.

Q. Your nephew? *A.* Yes, sir.

Q. Married to—? *A.* With the Lluberas lady.

Q. One of the defendants? *A.* Yes, sir.

Q. Sister to Manuel Francisco Lluberas? *A.* Yes, sir.

Attorney Ochoteco: Did Lluberas, or Chito, or Mr. Manuel Francisco Lluberas, tell you the day after closing the lease deal—did he call on you and sign the deed? The day after Mr. Blasini had called at your residence in Mayaguez?

Mrs. Olivieri: Yes, sir.

Q. Was it then that the deed of sale was signed? *A.* Yes, sir.

Q. And the dealings regarding the sale to Chito and the deed of sale from you to Lluberas, was it signed on the day after the cancellation of the mortgage of the widow of Tous-Soto? *A.* Yes, sir.

Q. Was it the next day? *A.* The next day, since I was free.

Q. Was it on the next day? *A.* Yes, sir.

Q. And on the very next day, did you close the deal and sign the deed? *A.* Yes, sir.

Q. On a single day? *A.* Yes, sir.

Q. Of course, you had already had previous talks about this deal? *A.* Yes, sir; two or three times; I do not remember either day or date.

Attorney Ochoteco: I beg the court to bear with me on account of the lengthy examination, but I am examining on the basis of a memorandum before me. When Mr. Chito Lluberas lent to

you the $45,000, was it not on the condition that the lien on account of the principal be prorated between the two estates, that is, that the $45,000 be split, upon the two estates, as security, proportionately to the $45,000?

Mrs. Olivieri: I gave him the mortgage because he had given me the money.

Q. Did not he suggest to you to distribute the lien? *A.* No, I do not think so. I do not remember.

Q. When did you do that? *A.* I mortgaged to him all my land for $45,000, and that is all I remember; that is all I understand.

Q. Tell me, madam. In the sale from you to Messrs. Lluberas of one of the estates on March 9, 1937, by deed number 40 executed before notary Luis Lopez-de-Victoria, it is stated that the consideration of the sale is $40,000. This amount is admitted by Mrs. Elvira Olivieri-Commins as having been received from the purchaser before this act to her entire satisfaction, and for which sum, etc. The $40,000 which you admit to have received as the purchase price of your estates, was it not part of the $45,000 lent to you by Mr. Lluberas on a mortgage?

Mrs. Olivieri: Yes, sir. It was part because the amount was 45—

Attorney Ochoteco: Exactly. In other words, out of the $45,000 of the mortgage of Mr. Lluberas, $40,000 were paid by you to him as the purchase price of these estates, there being $5,000 short to be paid to you? *A.* Yes, sir. And I mortgaged to him the estate "Juanita".

Q. Was it so? *A.* Yes, sir.

Q. Tell me, madam, why did you decide to cancel the mortgage of the widow of Tous-Soto in order to execute another one in favor of Messrs. Lluberas, instead of continuing that of Mrs. Tous-Soto, which had not become due? *A.* Because the mortgage interest to be paid to her was 9 percent, whereas the mortgage to Lluberas was 8 per cent, and I had the advantage that it would have been easy for me to pay him even at 7 percent, because we were good friends.

Attorney Ochoteco: Then the mortgage of the widow of Tous-Soto was bearing 9 percent and the mortgage to Lluberas was going to bear 8 percent?

Mrs. Olivieri: Yes, sir.

Q. Was it 1 percent the profit you were going to make? *A.* Yes, sir.

Q. Then, madam, in order to make up your mind to pay the mortgage to the widow of Tous-Soto and to borrow the money from Mr. Lluberas so as to profit by 1 per cent, you had figured and knew that you were going to be benefited by 1 percent? *A.* Yes, sir.

Q. Did you know that you had to pay her three installments of interest in advance by reason of the premature cancellation of the mortgage? *A.* I figured. I figured because 9 percent is not the same as 8 percent. I thought first: "May be later on he will reduce the rate of interest to seven."

Q. Did you take into account the cost to you of the cancellation of the mortgage to the widow of Tous-Soto, and the execution of the new mortgage, and record thereof in the Registry of Property?

Mrs. Olivieri: I did not give much thought to that.

Attorney Ochoteco: You stated that one further reason for substituting the mortgagee was that Mr. Lluberas was related to you? *A.* He is not related to me, but a close friend of mine.

Q. Do you consider each other as related? *A.* Yes, sir. In great mutual regard.

Q. A friendship, of how many years? *A.* A great many years.

Q. More or less? *A.* I do not know. Think of it, before he was born.

Q. At least, a friendship of 50 or 60 years? *A.* Almost.

Q. Tell me, madam. For the purpose of that substitution, you were borrowing from Mr. Lluberas $45,000 on a six-month mortgage. Do you realize that you were going to cancel a mortgage that had not yet become due, and substitute for it one to Mr. Lluberas for six months? *A.* I borrowed that money for six months, it is true, but always in due hope that he would extend

the time at a lesser rate of interest. And that is why I borrowed that money from him in order to pay the widow of Tous-Soto.

Attorney Ochoteco: We know already that, but how can you explain away the borrowing of that amount for six months ($45,000 for six months), after which period the mortgage credit would have become due, and then to find yourself after six months with a mortgage credit already due for $45,000?

Mrs. Olivieri: In the hope that subsequently he would reduce the rate of interest. I am sure he would have accommodated me.

Q. Madam, when you received the $40,000 from Mr. Lluberas by virtue of the sale made to him of one of your estates, there was the sum of $5,000 short, and that $5,000 according to you were lent by him on a mortgage on some other estate? *A.* Estate "Juanita".

Q. At the rate of 6 per cent and for five years? *A.* Yes, sir.

Q. And why did not you, when you executed the mortgage for $45,000, made that mortgage for five years, instead of for six months, at 6 per cent, instead of at 8 per cent, and on the other hand, when the sum was $5,000, you made it for five years?

Mrs. Olivieri: Will you please explain. I do not quite follow you.

Attorney Ochoteco: Of the $45,000 from Mr. Lluberas, $40,000 were for the sale of the estate "Indios". Then the balance of $5,000, up to $45,000, is secured by you with a mortgage upon the estate "Juanita", for five years, at the rate of 6 per cent annually. *A.* Yes, sir.

Q. Was it not so? *A.* Yes, sir.

Q. Now, the question is as follows: why, when a $5,000 mortgage is involved, did you execute such mortgage for five years at 6 per cent, and on the other hand when a $45,000 mortgage is involved you executed the mortgage for six months at 8 per cent? *A.* I will tell you. At the time of the execution of the mortgage for $45,000, I always hoped that he would reduce (the rate of interest), and always with the idea of borrowing such amount and pay, and this is proven by the fact that he was so liberal that

he executed to me the "Juanita" mortgage and brought down the interest to 6 per cent.

Q. The five-year mortgage?

Mrs. Olivieri: Yes, sir, and if I had asked him 20, he would have allowed me 20.

Attorney Ochoteco: But you did not ask him a 20-year mortgage when you borrowed from him the $45,000? *A.* At that time—

Q. Do you know attorney Porrata, Mr. Pedro M. Porrata? *A.* I think I do.

Q. The gentleman sitting there? *A.* I think I do.

Q. Did you state before that you knew Mr. Peralta? *A.* Yes, sir.

Q. Did you know, in or about the month of March 1937, Mr. Pastor Mandri? *A.* Yes, sir.

Q. And Mr. Gilberto Barbosa-Sicardo? *A.* I do not know him.

Q. Look and see if you know him. Look and see if you remember having seen him. *A.* This is the first time I see him.

Q. Please try to remember if you have seen him in your residence in Mayaguez, about the 10th of March, 1937. *A.* No, sir.

Attorney Ochoteco: Together with Mr. Peralta, Mr. Mandri and Mr. Porrata—

Mrs. Olivieri: The day when they forced their way into my house?

Q. What, did they force their way into your house? *A.* There was a crowd and I think he was not there.

Judge: Who is he?

Attorney Ochoteco: Gilberto Barbosa-Sicardo. When have you seen him for the first time? *A.* Now.

Q. Do not you remember the former ejectment proceeding, when you took the stand, madam, and that I introduced to you this same gentleman? *A.* I do not think he is the same.

Q. He is stouter, as he married. Do you remember my introducing to you a young man? *A.* I remember. I remember your introducing him to me, but I did not know that it was he.

Judge: That is what she answers, that she did not recognize him. *A.* It is because he is now stouter.

Attorney Ochoteco: Do you remember that these gentlemen called at your house in Mayagüez?

Mrs. Olivieri: Yes, sir.

Q. Please the court, I move for a five-minute recess.

Judge: Any objection from anybody?

Attorney Tormes: None.

Judge: Then a five-minute recess is granted.

[Recess of the court.]

Judge: The session of the court is proceeded with. The hearing of this case is continued. Let us proceed with the examination.

Attorney Ochoteco: Do you remember, madam, that in the deed of sale to Messrs. Lluberas from you, it was agreed as follows: "As there is a lease in favor of Mario Mercado e Hijos upon the estates sold, which lease matures on June 2, 1937, the purchasers shall take actual possession of such estates in accordance with the clauses of the aforesaid lease constituted by deed number 50 executed in Ponce on April 5, 1927, before notary Francisco Parra Capo, and Mrs. Elvira Olivieri Commins will take every step so that upon maturity of the lease the delivery shall be made as usual; but should Mrs. Elvira Olivieri Commins meet with difficulties in getting the actual possession of the estates hereinbefore described from the lessees thereof, such circumstance shall be held to be *force majeure*, and any delay in delivering the possession, without fault or negligence on the part of the vendor, shall not render the latter liable at all." Can you explain why such clause was inserted there, if you remember?

Mrs. Olivieri: I do not remember.

Attorney Ochoteco: Do you remember why it was inserted? *A.* Let me think a moment. That is in connection with Messrs. Lluberas, because I said: "If I cannot get these gentlemen to let me have the property, Chito, who is a man and who is well posted in all such things, will see to it that they deliver to him the lands

sold by me, because he can of course do that better than I", and I inserted it in the deed.

Q. That is not what is stated there.

Mrs. Olivieri: That is my explanation, a simple one, because my knowledge is not very profound. And being unable to do so, I said to him: "Chito, take charge of that", and then he did it.

Attorney Ochoteco: That is all with the lady.

Judge: Did you finish with the witness?

Attorney Ochoteco: Yes, sir.

Attorney Tormes: Mrs. Olivieri, you mentioned just a moment ago certain promissory notes that Mr. Emilio Blasini had delivered to you in the night of March 8, 1937?

Mrs. Olivieri: Yes, sir.

X-Q. Did he deliver to you four promissory notes? *A.* I think they are four.

X-Q. I show them to the party for examination. Then, have these papers been in your possession ever since? *A.* Yes, sir. I was keeping them and brought them with me.

X-Q. Let us identify them to be submitted in evidence in due time.

Judge: Let them be marked numbers 1, 2, 3, and 4 as exhibits for the defendants. Mrs. Olivieri, you said that you knew about the assignment or sale of the mortgage credit owed by you to Mario Mercado e Hijos, and the latter had assigned to Mrs. Belen, widow of Tous-Soto? Did you know of that?

Mrs. Olivieri: Yes, sir, on receipt of a letter from Zapater advising me that Mario Mercado e Hijos had assigned the mortgage right, the mortgage credit.

Attorney Tormes: Showing it to the brother attorney— *A.* That was written by Mr. Zapater.

X-Q. Showing him a copy of the notice and of the deed.

Attorney Ochoteco: That is all right.

Attorney Tormes: Look and see this.

[The witness examines some papers presented to her by attorney Tormes.]

A. It is stated here: "You are hereby notified . . ."

Attorney Ochoteco: Admitted—

Attorney Tormes: Is that the notice received by you when Mario Mercado e Hijos sold to the widow of Tous-Soto?

Mrs. Olivieri: Yes, sir.

X-Q. In order that these papers should be marked—

Judge: The court—

Attorney Tormes: —should be marked as identified papers—

Judge: It is marked Exhibit 5.

Attorney Tormes: For the present we have finished.

Attorney Sabater: Please the court, in order that also, as far as our client is concerned, these papers should be also identified—

Judge: Do you accept that evidence as yours?

Attorney Sabater: Yes, sir.

Judge: Then the attorney who represents Mrs. Elvira Olivieri-Commins makes his this evidence, and it is thus identified. Later on it will be submitted in evidence, but for the present they are identified. Then, is the testimony of Mrs. Elvira Olivieri-Commins over?

Attorney Tormes: Yes, sir.

Judge: Do both sides rest with the testimony of the witness?

Attorney Ochoteco: For the present we rest, without prejudicing to cite the same at the proper time in regard to some particulars that we may consider relevant.

Judge: Then, for the present it is over and the court is going to declare a recess.

Attorney Ochoteco: We have a request to make, and it is that at our expenses the telegraph operator in Mayaguez office, or the chief of the office, be summoned to appear, bringing the telegram submitted in evidence as Exhibit N. We want to make the following statement: this is to show that although this telegram is dated January 23, 1936, this telegram was sent from Mayaguez on January 23, 1937. It seems that by reason of being the first month of the year, it usually happens that the previous year is mentioned, and this is a telegram from Mrs. Elvira Olivieri dated

in 1937. We want the officer from the Mayaguez telegraph office to appear and bring with him the original of this telegram.

Judge: Then let the marshal issue the summons for his appearance, today or tomorrow?

Attorney Ochoteco: This afternoon would be preferable; tomorrow at nine A.M. would be better.

Judge: Then let us recess until two P.M.

[Recess of the court.]

AFTERNOON SESSION.

Judge: The session of the court is opened and the trial of the case continues as well.

SWORN TESTIMONY OF MANUEL FRANCISCO LLUBERAS.

Attorney Ochoteco: What is your name?

Mr. Lluberas: Manuel Francisco Lluberas.

Judge: Are you the person who is affectionately called "Chito"? *A.* Yes, sir.

Judge: It is for the purpose of identifying you.

Attorney Ochoteco: Are you one of the defendants in this case? *A.* Yes, sir.

Q. Will the witness please tell me the name of his mother? *A.* Elena Pasarell-Delgado.

Q. Is she at present in Puerto Rico? *A.* No, sir.

Q. How long has she been absent from Puerto Rico? *A.* The last time she visited Puerto Rico was about two years ago.

Q. Do you remember whether she went there about the month of February, 1937? *A.* About that time—

Judge: In February?.

Attorney Ochoteco: 1937. Do you know the "Juanita" estate? *A.* Not much in detail, but I have heard the estate spoken of.

Attorney Ochoteco: Do you know where it is located?

Mr. Lluberas: Yes, sir. I know where it is.

Q. Do you know the "Indios" estate? *A.* Yes, sir.

Q. Do you know where it is? *A.* Yes, sir.

Q. Are you an experienced farmer? *A.* Yes, sir. I can say I am.

Q. And in the matter of appraising rural estates? *A.* Yes, sir, in this part of Puerto Rico.

Q. How much was the "Juanita" estate worth in or about the year 1937, about the month of March? *A.* I could not tell you with precision, because I was never interested in that estate, nor have I made any inspection thereof, as is the custom with the purchasers of an estate.

Q. And as to the "Indios" estate? *A.* That was worth a certain amount for us.

Q. How much? *A.* As much as we paid for it.

Q. How much did you pay? *A.* Forty thousand dollars.

Attorney Ochoteco: When you say "we," whom do you have in mind?

Mr. Lluberas: My sisters and myself.

Q. Are your sisters the other co-defendants in this action, with Mrs. Elvira Olivieri-Commins? *A.* Yes, sir.

Q. Have you an idea as to the value of the "Juanita" estate? *A.* I might state an amount and be in error. I am not acquainted with it, and I do not know how much it brings.

Q. Do you remember having testified, in an ejectment proceeding instituted by you, the co-defendants Lluberas-Pasarell *v.* Mario Mercado e Hijos, before this court, presided by Judge Roberto H. Todd, Jr., where you testified as a witness? *A.* Yes, sir, I remember.

Q. Do you remember my putting to you the following question?—

Judge: Was it an ejectment proceeding?

Attorney Ochoteco: Talking about the "Juanita" estate, whether it was worth more than $25,000, and you said: "I think so." Do you ratify that assertion?

Mr. Lluberas: Yes, sir. I can give you a similar answer.

Judge: Are you referring to "Juanita" estate? *A.* Yes, sir.

Attorney Ochoteco: And you say that you paid for the "Indios" estate $40,000? *A.* Yes, sir.

Judge: How much did you testify that estate was worth?

Attorney Ochoteco: That it was worth more than $25,000. Did you lend Mrs. Elvira Olivieri Commins $45,000? *A.* Yes, sir.

Q. And did you buy the estate "Indios" referred to by us in this examination, for $40,000? *A.* Yes, sir.

Q. The deal between you and Mrs. Elvira Olivieri Commins, was it a loan? *A.* Yes, sir.

Q. Originally? *A.* A loan.

Q. An investment made by you? *A.* Exactly.

Attorney Ochoteco: Why is it that if what you were doing was an investment, a loan transaction whereby you were lending $45,000 to Mrs. Elvira Olivieri-Commins; why did you, when prorating the lien to be borne by the estates burdened by the debt, burdened the estate "Indios" with $40,000, and the "Juanita" estate with $5,000 only, if the "Indios" estate was worth $40,000, and the "Juanita" estate more than $25,000?

Mr. Lluberas: I understood that both estates were going to be given as security for the indebtedness, the payment of my loan; and the attorney who made the prorating had my full confidence and he did it that way; perhaps because it was more convenient for the notary, or the registry or for any other reason.

Q. Tell me, please, is there any other explanation that the witness might furnish, which is not that? Any further explanation other than that? *A.* I think this is the only explanation that fits the case.

Q. You, and I have in mind the date when you effected that purchase, on or about the 9th of March, 1938, and at the time of the trial of the ejectment suit, of which we know; the date about the 20th of December, 1937; about March 9, 1937, had you ever executed any mortgage in your life?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: And were you at that time as solvent as you are at present? *A.* I think so.

Q. And did you know at that time the meaning of a loan secured by mortgage? *A.* Of course.

Q. Because you had already made other deals regarding mortgages? *A.* Yes, sir.

Q. What was your age, or how old were you in 1937? Pardon my insistence as to the age. *A.* I was two years younger than now; a little less than 38.

Q. Between 37 and 38, more or less? *A.* Yes, sir.

Q. And had you been many years in business? *A.* Yes, sir.

Q. About 1937, had you been for several years in important business? *A.* Yes, sir.

Judge: Less than 38 years old means that you were then between 37 and 38?

Mr. Lluberas: Near 38.

Attorney Ochoteco: Please tell me; as you were, in or about March, 1937, a business man, an age of discretion, who had lent out money on mortgages, and a considerable sum being involved, $45,000 for instance, you did not see to it that the $45,000 were evenly distributed between those two estates, considering the liability of each estate, so that the two estates should answer for the $45,000 proportionately to their value? *A.* The estates covered the amount of the indebtedness; the payment of the debt.

Q. Was one answerable for $5,000 and the other for $40,000? *A.* Yes, sir.

Q. Why did not you see to it that they were answerable, that they were proportionately balanced, if you were a business man, proportionately to the value of each of these two estates, but instead you made one of the estates answer for $40,000 and the other estate, which according to you is worth $25,000, answer for $5,000 only? *A.* That did not matter.

Q. Why did not it matter? Did not you want to secure your money?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: At the maximum, on a 100 per cent se-

curity? *A.* I considered it well secured at a 100 per cent, as we did.

Q. You had testified that the "Indios" estate, bought afterwards by you and your sister, was worth $40,000? *A.* Yes, sir.

Q. If the estate was worth $40,000 and you made it to answer for a sum equal to its value, and allow the "Juanita" estate to answer for $5,000; was not it better to prorate such amount between the two, if one is worth $40,000 and the other is worth $25,000? Then, proportionately, let us put it, for example, that one estate should answer for $25,000 and the other for $20,000, or one for $15,000 and the other for $30,000? *A.* Because by the way it was done, I considered the investment to be secured.

Q. Then, you bought that estate which secured $40,000, precisely for that $40,000? *A.* Yes, sir.

Q. And you, in order to invest $45,000, which is a very respectable amount—at least to me—was it so to you?

Mr. Lluberas: Also, very respectable.

Attorney Ochoteco: To me that amount of $45,000 is a very respectable sum. Did you not, before investing such amount, go and see those estates, in order to ascertain their value? *A.* The estates were mortgagd for $41,000, and I deemed it unnecessary to go and look at the "Juanita" estate, in view of the fact that I knew what the two estates were worth, and what another investor would have advanced for the two estates.

Q. If I understood correctly—please correct me if I am mistaken—did you rely on the judgment of former mortgagees? *A.* Yes, sir.

Q. Did not you go and look at the "Juanita" estate? *A.* No, sir.

Q. Tell me, Mr. Lluberas, as you relied on the financial view point of former mortgagees as to the value of the "Juanita" estate and as to the value of the "Indios" estate, did you rely on that financial viewpoint as to the prorating of the mortgage liability? Did you prorate it in the same way as the former mortgagee; did you follow such viewpoint?

Mr. Lluberas: I have stated before that the attorney made the prorating of the valuation of the two estates.

Attorney Ochoteco: For the purpose of properly explaining my weighing of your testimony—and if my interpretation is wrong, please correct me. And you, who were going to invest $45,000 on two rural estates, who relied as to the final security on the judgment of a former mortgagee—please correct me if I am mistaken—was this so? *A.* Yes, sir.

Q. Do you state to me that as regards the prorating of the liability between the two estates, you allowed yourself solely and exclusively to be guided by the honest judgment of your attorney? *A.* Exactly.

Q. Of attorney Luis Lopez-de-Victoria? *A.* Exactly.

Q. And you, who were going to part with $45,000, a respectable sum according to you, you delegated to the notary the responsibility of prorating such amount, having followed the judgment, as to the investment, of the former mortgagee, for the prorating of the security? *A.* I accepted the prorating made by the attorney.

Attorney Ochoteco: And why did not you take the trouble; did not make the effort, did not act on your own initiative, as a man of business, as you have stated, the business of lending money on mortgage, did not make the prorating yourself, and you told the notary to make such prorating himself?

Mr. Lluberas: Because the "Indios" estate adjoins our property, and by appraising the other at $5,000 I considered that the money was well secured, without the necessity of entering into further details.

Q. Did you know that that estate was worth $40,000? *A.* Yes, sir, and some more.

Q. Was it worth more than $40,000? *A.* At that time, and subsequently I would have rejected an offer of $60,000.

Q. Irrespective of such considerations, which have no bearing on the suit. *A.* The value of the estate is relative.

Q. You have testified that this estate (and I am now confining

myself to your previous testimony), that that estate was worth $40,000; did not you call the notary's attention when you saw that he had set down $40,000 as the value of one estate and $5,000 as the value of the other? When making the deed, did you read the mortgage deed before affixing your signature to it?

Mr. Lluberas: Of course.

Attorney Ochoteco: Did not you call the notary's attention to it? *A.* I did not.

Q. Did not you ask him the reason why he made such prorating? *A.* It was immaterial. Such prorating in this case was immaterial.

Judge: Please proceed.

Attorney Ochoteco: When did you show to Mrs. Elvira Olivieri-Commins that you were interested in buying the "Indios" estate? *A.* I do not quite exactly remember, but it was long ago.

Q. As regards the date of the purchase, was it on March 9, 1937? *A.* A couple of years, perhaps. One or two years; a couple of years at least.

Q. Prior to the signing of the deed of sale?

Mr. Lluberas: *A.* Yes, sir.

Attorney Ochoteco: When did you first speak to her about your being willing to buy that estate? *A.* Two years prior to the execution of the sale. At least, the time previously stated. I do not know how long it was, but it was long ago.

Q. Did you tell her anything before? *A.* What I have just said. My answer to the former question.

Q. And what did she tell you? *A.* That she could not sell the estate.

Q. Why? *A.* Because she was under an engagement to the mortgagees.

Q. Try to refresh your memory and see if you can be more explicit in your answer. Can you remember whether, I put this question to you at the trial of the ejectment proceeding instituted by you and your sisters against Mario Mercado e Hijos, which trial was had on December 20, 1937, presided by Judge Roberto

H. Todd, Jr.? Can you remember whether I put that question to you, if you remember it? *A.* You must have put that question. Why?

Q. Can you remember if I put to you the following question: "And what did she tell you in answer to your offer to purchase from her?" "That she could not sell", was your answer. Is that all right?

Mr. Lluberas: Just as now.

Attorney Ochoteco: And I asked you: "Why?" And you answered: "Because she had executed a mortgage to Mario Mercado e Hijos which forbade her to dispose of her property." Do you remember having testified to that effect? *A.* Yes, sir, but you did not ask me whether that mortgage credit—

Q. So that you ratify that statement, that when you asked her the reason why she would not sell, she answered to you, about one or two years prior to the signing of the deed of sale from her to you, in connection with the "Indios" estate, that she could not sell because she had executed a mortgage deed to Mario Mercado e Hijos, which forbade her to dispose of her property? *A.* I do not ratify anything; that was my statement in that case, but afterwards it was assigned—

Q. My question is whether or not you made that statement in the previous ejectment proceeding, at the time and place above mentioned.

Attorney Tormes: I will move the court, in the exercise of the power conferred by Section 149 of the Law of Evidence, to order and direct the way in which the examination should be conducted. The witness has explained that if he ever said that—

Judge: The question is whether on that occasion he made such statement.

Mr. Lluberas: He asked me whether I would ratify that statement.

Judge: The court asks you whether on that occasion you made the statement which appears there. *A.* Exactly, I said so.

Attorney Ochoteco: Then, irrespective of your point of view

and irrespective of any explanation that you might wish or might be able to make at the proper time; it is a fact, and I am not speaking of what you might think, but of what Mrs. Elvira Olivieri told you; the fact is that when you asked Mrs. Elvira Olivieri the reason why she did not sell to you and to your sisters the "Indios" estate, she told you that she would not sell it because she had given a mortgage to Mario Mercado e Hijos, which forbade her to dispose of her property? *A.* She told me that she had an agreement with her creditors.

Attorney Ochoteco: Did not she mention to you a mortgage contract with Mario Mercado e Hijos which forbade her to dispose of that property?

Mr. Lluberas: I do not remember her having said that. She told that she had an agreement with her creditors.

Q. Just a moment ago, if my memory does not fail me, when reading the question to you and your answer, you stated that you remembered having testified that. *A.* Yes, sir.

Q. Do you remember that now? *A.* Yes, sir (an answer to a question).

Q. In regard to the negotiations for the purchase by the Lluberas people, and I am referring to you and to your sisters, who intervened in their behalf? *A.* I, myself.

Q. Were you at that time their attorney in fact? *A.* No.

Q. Do you remember my putting to you that question, in the ejectment proceeding to which I have referred, on the 20th of December, 1937, in the proceedings instituted by you and your sisters against Mario Mercado e Hijos? *A.* Yes, sir.

Attorney Ochoteco: Do you remember my putting to you the following question: "Are you their attorney in fact?" And you answered: "Yes, in that case I was not, but . . ."

Attorney Tormes: "But" what?

Attorney Ochoteco: "But" and leaders. I am not going to fill what is missing here.

Mr. Lluberas: Is it not stated there why that interruption occurred?

Attorney Ochoteco: You are answering in that way. Were you acting in their behalf? I asked you that question in that case and I am putting this same question to you now. *A.* I bought the estate and acted in their behalf and in my own behalf; subject to their ratification, of course.

Q. Did you act in their behalf? *A.* Yes, sir.

Q. And that was your answer on that occasion? And did they subsequently ratify the purchase made by you? *A.* Yes, sir.

Attorney Ochoteco: Was it so?

Mr. Lluberas: Yes, sir.

Q. Now, you lent, according to your testimony, $45,000 at the rate of 8 per cent to Mrs. Elvira Olivieri-Commins. *A.* Yes, sir.

Q. For six months? *A.* Yes, sir.

Q. In such important deal involving $45,000, were your sisters copartners in making such loan, or were you alone? *A.* Yes, sir.

Q. Yes, what? *A.* That they were.

Q. When I refer to you, for the purposes of the record, I refer also to your sisters. Such an important deal for $45,000 for such a short time of six months? *A.* What is your question?

Q. Why did you lent [*sic*] $45,000 for such a short term of six months?

Judge: So short?

A. Yes, sir. The term for that loan was suggested by Mrs. Elvira Olivieri. And if she had proposed a six-year term, I would have also lent her the sum.

Attorney Ochoteco: Tell me, Mr. Lluberas, being so experienced in business as you have stated, did you consider and do you still consider the sum of $45,000 an important sum of money? Did you deem it advisable to invest such an amount of $45,000 for a term of six months?

Mr. Lluberas: Mrs. Elvira Olivieri applied for such sum to cancel a mortgage.

Q. A mortgage upon the estate? *A.* Yes, sir.

Q. Of the widow of Tous-Soto? *A.* In order to save money on the interest.

Q. What did the saving consist in? *A.* One per cent during six months; but that does not mean that in specifying six months, no extension to five or ten years, and at a more reasonable rate of interest, could be secured.

Q. At a more reasonable rate of interest? Did not you discuss the reasonableness of the rate of interest at the time of closing the deal? *A.* On account of being pressed for time.

Q. Then, if I am not mistaken in weighing your statement (if I am mistaken, please tell me), Mrs. Elvira Olivieri wanted to save one per cent of the rate of interest which she was paying to the widow of Jose Tous-Soto on a mortgage credit that had not matured? Was not that so?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: Did she give you a mortgage in order to cancel that old mortgage not yet matured, for six months? *A.* Yes, sir.

Q. And who paid for the expenses of the cancellation of the mortgage of the widow of Tous-Soto? *A.* I was not concerned with that.

Q. In other words, that you did not pay those expenses? *A.* No, sir.

Q. Do you presume that it was she, and you are not certain, or rather you are certain that it was not you? *A.* Yes, sir.

Q. And the expenses of recording the cancellation of the mortgage? *A.* They were to be borne by her.

Q. Those of the execution of the new mortgage? *A.* To be borne by her.

Q. And the expenses of the record of the new mortgage?

Mr. Lluberas: To be borne by her.

Attorney Ochoteco: Three installments of interest that she had to pay, according to these papers, to the widow of Tous-Soto for the premature cancellation of the mortgage? *A.* I suppose, to be borne by her; not by me.

Q. Tell me: your experience as a man of business, and I am

going back to that time, made it advisable for you to make such an investment for six months? *A.* Yes, sir.

Q. And have you made any other deals for six months in mortgages involving $40,000? *A.* I would not have made them, but I have seen them made.

Q. Where? *A.* In the United States.

Q. And in Puerto Rico? *A.* I have not been here long.

Q. How long did you live in the United States? *A.* Twenty-five years.

Q. When did you come from the United States? *A.* In 1933.

Attorney Ochoteco: Nineteen hundred—

Mr. Lluberas: Thirty-three.

Q. That means that you had been about four years when you made the deal of the purchase of the "Indios" estate? *A.* Yes, sir.

Q. That is all.

Judge: Is that all?

Attorney Ochoteco: Not yet. You lent her, and then, when the estate was purchased from Mrs. Elvira Olivieri, she still owed you $5,000 of the $45,000? *A.* Yes, sir.

Q. Is it a fact that the $45,000 of the purchase price were represented by $40,000 of the $45,000 that she had borrowed on a mortgage? *A.* Of the $45,000 of the purchase price she paid me $40,000 in land.

Q. Was it so? *A.* Yes, sir.

Q. And the balance of $5,000 were in a mortgage for five years at 6 per cent? *A.* Yes, sir.

Q. My question now is as follows: why did not you lend to Mrs. Elvira Olivieri the $45,000 for five years from the start?

Mr. Lluberas: She did not borrow them for five years; she borrowed them for six months only.

Attorney Ochoteco: And why was that money lent at 8 per cent instead of at 6 per cent? *A.* Because time was pressing and the short term of the loan.

Q. Is it not a fact that the higher the amount of a loan, the lesser the rate of interest? *A.* Yes, sir.

Q. And that the longer the term the lower the rate of interest? *A.* Yes, sir.

Q. That for $45,000 the rate of interest is lower than for $5,000? *A.* For ten or twenty years, yes, but not for six months.

Q. And why not for six months? *A.* Because she did not ask for it, and was willing to pay that.

Q. And what had she in mind when borrowing that money? *A.* She had in mind to pay an obligation.

Q. To whom? *A.* To Mrs. Belen, widow of Tous-Soto.

Attorney Ochoteco: Why do you state that that was her aim in borrowing from you that money?

Mr. Lluberas: Because she borrowed it to pay Mrs. Belen, widow of Tous-Soto.

Q. Did she tell you that when discussing the deal with you? *A.* After having borrowed the money.

Q. And prior to the receipt of the money, had she told you? *A.* Yes, sir.

Q. Did you know, when Mrs. Elvira Olivieri borrowed from you that money, that she wanted it to pay the other mortgage? *A.* Yes, sir.

Q. In reference to the trial of the ejectment proceeding so often mentioned by me during this examination; at the trial held before this court on December 20, 1937, Judge Roberto H. Todd, Jr., presiding, in the action instituted by Messrs. Lluberas-Pasarell against Mario Mercado e Hijos, do you remember that I asked you why you had charged 6 per cent for five years and why you had charged 8 per cent for $45,000, and that you then answered: "She could get the money at 6% somewhere else, according to her." "And the $45,000?" "She could not get them at 6%." Did you state that?

Mr. Lluberas: If this is there, I must have said so.

Attorney Ochoteco: That $5,000 could be easily found at 6 per cent? *A.* Yes, sir. If this is there, I said it.

Q. Were you her close friend? *A.* Yes, sir.

Q. For many years? *A.* Yes, sir.

Q. How many years, more or less? *A.* For many years, because her children and myself have been brought up together while we were in Puerto Rico. Her children and myself were brought up together before we sailed for the United States.

Q. Therefore, was it a friendship going back, more or less, twenty years? *A.* And more.

Q. Or twenty-five years? *A.* And more.

Q. And you, if my memory does not fail me, are the brother-in-law to one of her nephews? *A.* Quite so.

Q. To which nephew are you a brother-in-law? *A.* Mr. Emilio Blasini.

Q. And then you charged her 8 per cent because you knew that she had no chance to get $45,000 unless it was at 8 per cent, and you charged 6 per cent in the other case because you knew that she could have found the money somewhere else?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: You made use of your natural acumen as a business man, did not you? *A.* Yes, sir.

Q. Why did not you make use of that business acumen of yours in a better way, in reference to the prorating of the mortgage liens, but instead you relied on what the original mortgagee had done? *A.* And the attorney—

Q. The attorney Lopez-de-Victoria? *A.* Yes, sir.

Q. And did Mrs. Elvira Olivieri receive any money on the day of the execution of the mortgage by Mrs. Elvira Olivieri to you? *A.* No, sir.

Q. Did you retain in your possession the whole $45,000? *A.* Yes, sir, at the request of Mrs. Elvira Olivieri.

Q. To be applied, as you have stated, to the cancellation of the mortgage of the widow of Tous-Soto?

Mr. Lluberas: For that purpose.

Attorney Ochoteco: When was it, Mr. Lluberas, that you agreed with Mrs. Elvira Olivieri-Commins (and when I say "you"

I mean your sisters represented by you) upon the purchase of the "Indios" estate? *A.* After the cancellation of the mortgage of Mrs. Belen, widow of Tous-Soto, we started negotiations for the purchase of the estate.

Q. After the cancellation— *A.* Of the mortgage credit.

Q. Do you remember whether at the time of the ejectment proceeding to which I have referred; at the time of the trial of the ejectment action brought by you and your sisters against Mario Mercado e Hijos, before Judge Roberto H. Todd, on December 20, 1937, I put you the following question [reading from the stenographic transcript in said case]: "When did you agree with Mrs. Elvira Olivieri-Commins, your sisters being represented by you, to purchase the 'Indios' estate?" Answer to the question: "Probably while steps were being taken for the cancellation of the mortgage." *A.* Probably.

Q. I put to you the question and you answered— *A.* Probably.

Attorney Ochoteco: Do you insist in that answer?

Mr. Lluberas: Yes, sir.

Q. Why probably? *A.* I cannot tell you. I have just told you that happened after the cancellation of the mortgage, and when the nephew of Mrs. Elvira Olivieri, whom I met after having effected the payment of the cancellation, told Mrs. Elvira Olivieri.

Q. Was it not on the day following the cancellation of the mortgage? *A.* The following day the deed of sale was signed.

Q. Was the deed of sale signed on the day following the cancellation of the mortgage? *A.* Yes, sir.

Q. Now, my question is this: when was it—I am not referring to the signing of the deed—that you agreed between yourself, your sisters and Mrs. Elvira Olivieri upon the sale? *A.* The day the deed was signed.

Q. On that same day? *A.* The day that the deed of sale was signed.

Q. Was it then that the deal was agreed upon? *A.* The purchase price and everything.

Q. Was that deal closed in May in her residence?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: Did your notary, my colleague Lopez-de-Victoria, go with you? *A.* Yes, sir.

Q. Did you take with you the deed already drafted? *A.* Yes, sir.

Q. Already drafted? *A.* Yes, sir.

Q. Why do you know that? *A.* Because the sale was signed, and a deed had anyhow to be produced.

Q. Did you notice whether the notary drew out the deed from any bag? *A.* Yes, sir.

Q. Did he bring it already drafted from Yauco? *A.* Yes, sir.

Q. Did you hand it to her for her signature, and the business was concluded? *A.* Yes, sir.

Q. Do you confirm such assertion? *A.* Yes, sir.

Q. I suppose that Mr. Rafael Barletta, whom you know, was present?

Mr. Lluberas: I think he was present.

Attorney Ochoteco: Then was he present either during the discussion or while they were affixing their signatures to the deed of sale in Mayaguez? *A.* I think he was present.

Q. Do not you remember well? Do not you quite remember? *A.* Not exactly.

Q. Do you remember whether I put to you the following question: "Was Barletta present?" and you answered: "Barletta. And the other children. I do not remember the name of the doctor who was here this afternoon, and the other doctor likewise, a dental surgeon." Is this what you remember, that on that day Barletta was there? *A.* Yes, sir.

Judge: What did you answer? *A.* Affirmatively.

Judge: Was attorney Lopez-de-Victoria there? *A.* Yes, sir.

Attorney Ochoteco: Did you know that Mario Mercado e Hijos had been given an option to purchase and lease?

Mr. Lluberas: Yes, I did, and I knew that those people had assigned the same to Mrs. Belen, widow of Tous-Soto.

Attorney Ochoteco: Who told you that Mario Mercado e Hijos had that right to lease and that option to lease and purchase? *A.* Mrs. Elvira Olivieri had informed me that she was indebted to Mrs. Belen de Tous-Soto.

Q. Did Mrs. Elvira Olivieri tell you that Mario Mercado e Hijos held an option to purchase and lease in regard to this estate? *A.* Yes, sir—

Q. Finish your statement. *A.* That Mrs. Elvira Olivieri had told me that she was indebted to Mrs. Belen de Tous-Soto.

Q. I am going to put to you now the same question as in the ejectment proceedings of December 20, 1937, before Judge Todd, in the ejectment proceedings instituted by Messrs. Lluberas-Pasarell against Mario Mercado e Hijos, and I am reading from the stenographic record in that case: "Did you know whether Mario Mercado e Hijos held an option to purchase and lease?" Your answer: "Yes, she had informed me." Then, she told you, and you ratify such statement?

Mr. Lluberas: She had told me that she was indebted to Mario Mercado e Hijos, and then to Mrs. Belen de Tous-Soto.

Attorney Ochoteco: The question is in reference to Mario Mercado e Hijos, whether she told you that Mario Mercado e Hijos held an option to lease and purchase. This is the question I put to you now. *A.* That Mario Mercado e Hijos had assigned the same to Mrs. Belen Tous-Soto.

Q. Let us distinguish. One thing is your knowledge, your belief; and another is what Mrs. Elvira Olivieri told you concerning Mario Mercado e Hijos. The only thing we are interested is whether you knew that Mario Mercado e Hijos held an option to purchase and lease, and whether said question was put to you in that case, and you answered: "Yes, she had herself told me." Did she tell you that? *A.* Yes, probably; of course.

Q. Did you know that? *A.* I knew that she was indebted, and that such obligation included an undertaking.

Q. This question made to you just a short while ago, whether you knew it, is the same question I put you in the ejectment pro-

ceeding, to which I have been referring continuously, instituted before this court, presided by Judge Roberto H. Todd, Jr.; Hermanos Lluberas-Passarell *v.* Mario Mercado e Hijos. My question was this: "Do you know that?" Your answer was: "Of course, I knew it." Do you ratify that statement?

Mr. Lluberas: If she stated that she was indebted, I knew it, of course.

Attorney Ochoteco: Does the witness remember whether on cross-examination in the ejectment proceedings before this court, presided by Judge Roberto H. Todd, Lluberas-Pasarell, plaintiffs, *v.* Mario Mercado e Hijos (I am reading from the stenographic record), your attorney in that action, Lopez-de-Victoria, put to you the following question: "Please tell me . . ." (I am reading from the examination of you by my colleague Lopez-de-Victoria) "Please tell me, when Mrs. Elvira Olivieri talked with you concerning the estate, and she said that she did not sell because she had granted an option, did she tell you in whose favor was that option?" And you answered: "In favor of Mario Mercado e Hijos." That was your answer. My colleague said: "Or of the widow of Tous-Soto?" The answer: "No." "And in whose favor?" "In favor of Mario Mercado e Hijos." "Not in favor of the widow of Tous-Soto?" "Not in favor of the widow of Tous-Soto", you answered. In order to refresh your memory, please pay attention to what I say, because I am reading from the stenographic record. What I have just read. You can refresh your memory by examining the record.

[The witness examines a record presented to him by attorney Ochoteco.]

Attorney Ochoteco: Did you read again what I had already read to you from the stenographic record?

Mr. Lluberas: Yes, sir.

Q. Can you remember it now, that your memory is refreshed. *A.* There is no doubt that I said so in the above case.

Q. Do you confirm this? *A.* I say now that Mrs. Belen Tous-Soto was the holder.

Q. I mean what Mrs. Elvira Olivieri said to you. Do you confirm that you expressed yourself in that case just as appears from the record? *A.* Yes, sir.

Q. That is, that Mrs. Elvira Olivieri-Commins told you that the option was in favor of Mario Mercado e Hijos, and that she never told you that it was in favor of the widow of Tous-Soto?

Mr. Lluberas: The point is this: she did not state that she was bound to her mortgagee. So that when I made that answer to you at the time, but I do not exactly remember what Mrs. Elvira Olivieri might have said—

Attorney Ochoteco: When has your memory served you best, just now, when testifying as to these facts, today, the 14th of November, 1939, or at that time, about December 20, 1937, as regards the conversation had on March 9, 1937? *A.* What I meant to say—

Q. I want to know— *A.* In the above case I might have said so.

Q. That you might have answered as appears from the record? *A.* I believe what the record says.

Q. Do you admit that there is nothing missing from the record? *A.* I admit having answered that.

Q. That is all with the witness.

Cross Examination.

Attorney Tormes: To whom did you deliver the $41,000 of the mortgage credit that had belonged to Mario Mercado e Hijos, which payment was effected on March 8, 1937?

Mr. Lluberas: To Mrs. Belen Tous-Soto.

Attorney Tormes: With whom did you deal to effect that payment? *A.* With Mrs. Belen Tous-Soto and her attorney Zapater.

X-Q. Attorney Fernando Zapater? *A.* Yes, sir.

X-Q. At what time did you effect that payment; during the day or at night? *A.* During the day.

X-Q. Where was the payment effected? *A.* At the home of Mrs. Belen Tous-Soto.

X-Q. Did you stay long in the office of attorney Zapater? *A.* For a while, while signatures were being affixed to I do not remember which papers.

X-Q. How long or how many days elapsed, by the time when you, as the agent of Mrs. Elvira Olivieri-Commins, notified the intention of your principal to pay such mortgage credit to that lady? How many days elapsed from your notification of the intention to pay in her behalf, to the time such payment was effected? *A.* I do not exactly remember, but it must have been a long time.

Attorney Tormes: What do you mean by a long time?

Mr. Lluberas: One month; something like that. Perhaps more. I do not exactly remember.

X-Q. Was the mortgage executed on February 26? *A.* Yes, sir.

X-Q. And the payment effected on March 8? *A.* Yes, sir. The taking of the necessary steps to effect the payment required that long.

X-Q. Do you know Mr. Peralta? *A.* Yes, sir.

X-Q. On some of the occasions when you called at the office of my colleague Zapater, did you see Mr. Peralta there?

Attorney Ochoteco: We object. Nobody has mentioned Mr. Peralta nor has asked the witness being examined in regard to Mr. Peralta.

Attorney Tormes: We know that Mr. Peralta was the manager of Mario Mercado e Hijos, and was the manager in charge of that office.

Judge: The question is admitted.

Attorney Ochoteco: We take exception.

Judge: The question is whether you knew Peralta.

Mr. Lluberas: Yes, sir.

Attorney Tormes: Do you know what office he was filling about March, 1937? *A.* He is the manager of Mario Mercado e Hijos.

X-Q. Was he the manager of Mario Mercado e Hijos? *A.* Yes, sir.

X-Q. Did you meet him in the office of attorney Zapater on

any occasion? *A.* We happened to meet in the office of attorney Zapater.

X-Q. Did you know whether attorney Zapater was the attorney of Mario Mercado e Hijos? *A.* Yes, sir. I knew it.

X-Q. You stated that after having paid the widow of Mr. Tous-Soto the amount of the mortgage credit that had belonged to Mario Mercado e Hijos, you saw the nephew of Mrs. Elvira Olivieri? *A.* Yes, sir.

X-Q. Which nephew? *A.* Emilio Blasini.

X-Q. Where did you see him? *A.* In his home, in the outskirts of Ponce. I do not know the name of the place.

Attorney Tormes: Barrio Canas?

Mr. Lluberas: Yes, sir.

X-Q. On the way to Penuelas? *A.* Yes, sir.

X-Q. That is all with the witness.

Attorney Ochoteco: With the leave of the court. Please tell me [to the witness], you have just stated, answering attorney Tormes, that you saw the nephew of Mrs. Elvira Olivieri, Mr. Blasini. Where? *A.* In his home.

Q. Where is that? *A.* Just leaving Ponce, on the way to Penuelas.

Q. And when did you see him? *A.* On the 8th, in the afternoon, returning to Yauco.

Q. On the 8th, in the afternoon. Was it on the 8th that the mortgage was cancelled? *A.* Exactly.

Q. And did you see him there? *A.* Yes, sir.

Q. Did you go to Mayaguez the next day? *A.* Yes, sir.

Q. That is all with the witness.

Judge: Any further question?

Attorney Tormes: Did the nephew of Mrs. Elvira Olivieri give you any commission?

Mr. Lluberas: Not at all.

X-Q. Did he deliver anything to you for her? *A.* He requested of me, upon knowing that I had in my possession some cancellation papers, to let him have them so as to take them to her, be-

cause he was going to Mayaguez. I do not know what she might have done with them.

X-Q. Did you deliver them to him? *A.* Yes, sir.

X-Q. These promissory notes? *A.* Yes, sir, these promissory notes produced by Mrs. Elvira Olivieri this morning.

X-Q. Did you see again Mr. Blasini after that, on that same day or the next day? *A.* In the evening.

X-Q. On that same day, the 8th? *A.* Yes, sir.

X-Q. Where? *A.* In my home at Yauco.

X-Q. Had he been commissioned for anything? *A.* That Mrs. Elvira Olivieri said—

Attorney Ochoteco: We object as being hearsay.

Attorney Tormes: Did she commission you through Mr. Emilio Blasini?

Mr. Lluberas: To call on her.

Judge: You cannot repeat what she said, but you may answer whether you had been commissioned by her. *A.* To call on her.

X-Q. Were you asked so? *A.* Yes, sir.

Attorney Tormes: Did you go and call on Mrs. Elvira Olivieri? *A.* The next day.

X-Q. That was the 9th of March? *A.* Yes, sir.

X-Q. That is all with you.

Attorney Ochoteco: What time was it when you say Blasini just leaving Ponce on his way to Penuelas? *A.* He was returning.

Q. What time was then? *A.* Between 5:30 and 6.

Q. And when did you see him again in the evening?

Mr. Lluberas: Subsequently, at midnight.

Attorney Ochoteco: What do you mean by midnight? *A.* After eleven o'clock.

Q. After eleven o'clock in that night in Yauco? *A.* Yes, sir.

Q. And at what time on the next day was the deed signed? *A.* In the afternoon.

Q. At what time. *A.* Three or four P.M.

Q. On the following day? *A.* Yes, sir.

Q. Are you sure? *A.* Yes, sir.

Q. At what time did you reach Mayaguez? *A.* About two or three in the afternoon.

Q. Did you reach Mrs. Elvira Olivieri's home about 2 or 3 P.M. *A.* Yes, sir.

Q. When was the deed signed? *A.* Shortly afterwards.

Q. Long afterwards? *A.* What I know is that I returned from there at night.

Q. Was the deed signed at three o'clock?

Mr. Lluberas: I do not remember.

Attorney Ochoteco: If I have not understood the witness wrongly (please correct me if I have); I have understood you saying that the deed was signed about three in the afternoon. At what hour did you arrive? *A.* Between two and three.

Q. And when was it signed? *A.* Long afterwards.

Q. More or less, at what time? *A.* In due time; at 6, 7, or 4. I do not remember.

Q. Had you a talk there? *A.* Yes, sir.

Q. That is all.

Judge: You may withdraw. A five-minute recess.

[The court recesses.]

Judge: The session of the court is opened.

TESTIMONY OF JOSE R. PERALTA.

Attorney Ochoteco: Your name?

Mr. Peralta: Jose R. Peralta.

Q. Your occupation? *A.* Manager of Mario Mercado e Hijos.

Q. How long have you held that job? *A.* Ever since 1934.

Q. Do you know Mr. Rafael Barletta? *A.* Yes, sir.

Q. How long have you known him? *A.* Over five years, approximately; from reference, more or less.

Q. I am showing you Exhibit N for the plaintiff—

Attorney Tormes: Already seen.

Attorney Sabater: Already seen.

Attorney Ochoteco: Please tell me what is this I am showing you. *A.* A wire received by me and signed by Mrs. Elvira

Olivieri-Commins, addressed to Mario Mercado e Hijos, and referring to the receipt of certain offer.

Attorney Tormes: Not to what it refers.

Attorney Ochoteco: Who received it?

Mr. Peralta: I.

Q. When? *A.* On January 23, 1937.

Q. 1937? *A.* Yes, sir.

Judge: Which date? *A.* January 23, 1937.

Attorney Ochoteco: January 23, 1937.

Attorney Tormes: As the wire bears a different date, this is liable to—

Judge: He says that he received it on that date. He does not say that the wire bears that date. That he received it on that date.

Attorney Ochoteco: Do you know who was the Rafael referred to by Mrs. Elvira Olivieri-Commins in said wire? *A.* Mr. Rafael Barletta, married to one of her daughters.

Attorney Ochoteco: Do you know Mrs. Elvira Olivieri-Commins?

Mr. Peralta: Yes, sir.

Q. How long? *A.* Over 5 or 6 years. Ever since I was in the Banco de Ponce.

Q. What was your position in the Banco de Ponce? *A.* I was assistant manager.

Q. Can you tell us whether on March 9, 1937, or at any other time, Mrs. Elvira Olivieri-Commins notined Mario Mercado e Hijos that she had received offers from third parties to buy or lease from her the "Juanita" and "Indios" estates, belonging to her? *A.* No, never. She never notified either Mario Mercado e Hijos or any of the parties interested in the firm.

Q. Do you know whether at any time the partnership Mario Mercado e Hijos, prior to March 9, 1937, entered into negotiations with Mrs. Elvira Olivieri-Commins to either purchase or lease such estates, "Juanita" and "Indios"? *A.* On several occasions.

Q. With whom had such conversations been held? *A.* They

were started with Mr. Rafael Barletta, on January 4, 1937, and were continued on more than twelve or fifteen different occasions with Barletta himself and with her.

Attorney Ochoteco: What kind of offers were they, and through whom and when were they made, approximately, if you remember the date?

Mr. Peralta: The first conversation was had with Mr. Rafael Barletta, in the office of the Central, in the presence of the manager of the firm and your witness.

Q. Can you tell the exact date? *A.* January 4, 1937.

Judge: On what date? *A.* January 4, 1937.

Attorney Ochoteco: Tell me, who was the agent who intervened in the offers to lease the estates "Indios" and "Juanita", from Mrs. Elvira Olivieri-Commins? *A.* On most of the occasions it was Mr. Rafael Barletta, and on some others it was she.

Q. In what capacity did Mr. Rafael Barletta intervene? *A.* He appeared authorized by her, to initiate negotiations in connection with the sale, and on the other occasions in connection with the lease.

Attorney Ochoteco: Did Mrs. Elvira Olivieri-Commins ever object to any of the acts performed by Mr. Rafael Barletta?

Mr. Peralta: Never.

Q. In connection with the sale or lease of the estates "Juanita" and "Indios", referred to in your testimony, did you have an opportunity to talk with Mrs. Elvira Olivieri-Commins? *A.* Yes, sir.

Q. In connection with the steps taken by Mr. Rafael Barletta? *A.* Yes, sir.

Q. Do you remember the date of those occasions? *A.* I think it was about March 4, 1937.

Judge: What date did you mention? *A.* March 4, 1937.

Attorney Ochoteco: Is that the exact date? *A.* Exactly.

Q. Exactly? *A.* Yes, sir, and as an explanation I want to state that on that day they were celebrating what we called "Vic-

tory Banquet", in celebration of the victory of the Democratic Party in the United States, and this is why I remember the date.

Attorney Ochoteco: Did you ever visit Mrs. Elvira Olivieri-Commins in Mayaguez?

Mr. Peralta: On the date I have just mentioned. March 4, 1937.

Q. For what purpose? *A.* The purpose I had in mind when I went to Mayaguez to see Barletta in connection with the business in hand, and which had been the subject of conversations ever since January, that is, the lease of "Indios" and "Juanita".

Q. Of "Indios" and "Juanita"? *A.* Yes, sir.

Q. [Showing these documents to attorneys Tormes and Sabater.]

Attorney Tormes: Already seen, a series of telegrams.

Attorney Ochoteco: Please examine these documents which I show you [producing several telegrams].

[The witness examines the documents produced by attorney Ochoteco.]

A. This is a series of telegrams signed by Mr. Rafael Barletta, the first sent from Mayaguez on January 9, 1937, and addressed to your witness. The second sent from Mayaguez on January 14, 1937, also addressed to your witness. The third from Mayaguez on February 10, 1937, also addressed to me; the fourth from Mayaguez, dated February 5, 1937, addressed to Mario Mercado e Hijos; and the fifth from Mayaguez, dated February 18, 1937, addressed to your witness.

Attorney Ochoteco: Were all received by you?

Mr. Peralta: Yes, sir.

Q. To what do these telegrams refer?

Attorney Tormes: The telegrams speak for themselves.

Attorney Ochoteco: In connection with what were they sent? For which reason? This is the question.

Judge: Admitted.

A. All refer to different interviews upon which we agreed in

connection with the business pending concerning the estates "Indios" and "Juanita".

Attorney Ochoteco: We submit them in evidence, and request that they be marked as separate exhibits, for better handling.

Attorney Tormes: We object to the admission of these telegrams, as being immaterial, impertinent and irrelevant, and because they prove absolutely nothing in connection with the matters in issue.

Judge: The telegrams are five. The court admits them in connection with the testimony of the witness and will attach to them any probatory value the same may have in connection with the evidence as a whole.

Attorney Sabater: We object, and take exception, as being irrelevant matter.

Attorney Tormes: We take exception.

Judge: Let them be marked as follows: 01, 02, 03, 04 and 05. The telegrams are five.

[Attorney Ochoteco shows a paper to attorney Tormes.]

Attorney Tormes: Already seen. A letter dated December 15, 1936, sent by Mrs. Elvira Olivieri-Commins to Mario Mercado e Hijos.

Attorney Ochoteco: This is the letter to which my colleague has made reference, dated December 15, 1936. Please examine this document.

[The witness examines the document presented by attorney Ochoteco.]

Mr. Peralta: This is a letter from Mrs. Elvira Olivieri-Commins, dated in Mayaguez, on December 15, 1936, and addressed to Mario Mercado e Hijos.

Attorney Ochoteco: Why do you know that that letter is from Mrs. Elvira Olivieri-Commins? *A.* I am acquainted with her signature.

Q. Are you acquainted with her signature? *A.* Yes, sir. It contains moreover a note set down in my own handwriting.

Q. We offer this letter in evidence, mainly on account of the

following, which is pertinent: "When these holidays are over, don Rafael is going to speak to you on business, etc."

Attorney Tormes: I would have to cross-examine him before.

Attorney Ochoteco: You may cross-examine him.

Attorney Tormes: On December 15, 1936, when Mrs. Elvira Olivieri-Commins sent this letter to Mario Mercado e Hijos, had Mario Mercado e Hijos leased the "Juanita" and "Indios" estates? *A.* Yes, sir.

X-Q. And did they pay her any rentals? *A.* Yes, sir.

Attorney Tormes: Had Mrs. Elvira Olivieri any funds? Was she able to send you drafts in payment of moneys?

Attorney Ochoteco: That is not the procedure, under the law of evidence. We object.

[Attorney Ochoteco argues thereon.]

Attorney Tormes: If we continue in this way, we are going to make a voluminous record.

Judge: Let us leave the question pending until the examination of the witness is over.

[Attorney Ochoteco shows a document to attorneys Tormes and Sabater.]

Attorney Tormes: Already examined.

Attorney Sabater: Already examined.

Attorney Ochoteco: Please examine this document and tell me what document is this. *A.* This is a letter written by Mr. Rafael Barletta to Mario Mercado e Hijos, from Mayaguez, on February 6, 1937.

Q. Why do you know that it is from Barletta? *A.* Because it is in his handwriting and besides on paper with his letterhead.

Attorney Ochoteco: To be submitted in evidence.

Attorney Tormes: We would have to cross-examine him.

Judge: We will put off its admission until the cross-examination of the witness is over.

Attorney Ochoteco: Did you say that all these letters from Mr. Barletta to Mrs. Elvira Olivieri-Commins were in connection with what?

Mr. Peralta: In connection with the business in hand. They had been discussing in connection with the lease of the estates "Indios" and "Juanita".

Q. Did not they speak of purchase?

Attorney Tormes: By the way it is put it is a leading question.

Attorney Ochoteco: I withdraw it. Did you talk about negotiations? *A.* On former occasions I have testified that the first interview with Barletta concerned the purchase of one of the estates.

Q. The purchase?

Mr. Peralta: Yes, sir. Of one of the estates.

Attorney Ochoteco: When was that? *A.* At the first interview, January 4, 1937.

Q. And as to the conversations about the lease, when did they take place? *A.* On several occasions. If the court grants me leave to avail myself of a memorandum which I carry with me, I may state the dates.

Q. Could the witness, without the necessity of availing himself of his memorandum, recite the dates of the interviews? *A.* I could not, because they are so many—

Q. How and when did the witness prepare such memorandum? *A.* It is extracted from a book which I usually keep on my desk, in connection with the several business appointments pending and of interviews.

Q. Is that where you extracted the memorandum from? *A.* Yes, sir.

Q. Please the court, we beg the court to allow the witness to avail himself of that memorandum, as prepared under the circumstances stated by the witness, so that he might make reference accurately to the different dates of the interviews.

Judge: Is there any objection?

Attorney Tormes: If he prepared it—

Judge: If it was prepared by you yourself, you may avail yourself of it in order to refresh your memory.

Mr. Peralta: The first interview took place on January 4, 1937.

Attorney Ochoteco: Please go slowly. *A.* January 4, 1937, the first interview.

Judge: Just a moment. January— *A.* January 4, 1937.

Attorney Ochoteco: Where? *A.* In the office of your witness, in Central Rufina, Guayanilla.

Q. With whom was the interview? *A.* With Mr. Rafael Barletta, Mr. Mario Mercado being present.

Q. And the second interview? *A.* January 5, 1937, at the same place.

Judge: January—

Mr. Peralta: Five, 1937, at the same place.

Attorney Ochoteco: Who were present? *A.* Mr. Barletta and I only.

Q. And the third interview? *A.* The third interview was made for January 9, but in January 9 he sent a wire postponing it to January 11.

Judge: January 11, of which year? *A.* All of them in 1937.

Q. Where? *A.* In Guayanilla, in the office of your witness in Central Rufina.

Attorney Ochoteco: And the fourth interview? *A.* The interview to take place on January 11 was put off by him to January 13, 1937.

Judge: January— *A.* Thirteen, 1937.

Attorney Ochoteco: Where? *A.* At the same place, that is, in the office of your witness in Central Rufina. On January 13, 1937, the date we had agreed upon, he failed to keep the appointment and your witness on that account sent him a telegram.

Attorney Ochoteco: On what date?

Mr. Peralta: January 13, 1937.

Judge: When you say "he", whom do you mean? *A.* Mr. Rafael Barletta.

Attorney Ochoteco: Did not he come on January 13? *A.* No, sir.

Q. Please—

[Attorney Ochoteco shows a document to the witness.]

Attorney Tormes: Document already seen.

Attorney Ochoteco: What is this I show you? *A.* A copy of the telegram sent by me to Mr. Rafael Barletta, on January 14, 1937, in connection with the appointment we had concerted for January 13, 1937, and which he failed to keep.

Q. Can you tell whether that telegram was sent to him? *A.* Yes, sir, and he answered.

Q. Did he answer? *A.* Yes. sir.

Attorney Ochoteco: In which way?

Mr. Peralta: He answered with another telegram of even date, January 14, 1937.

Q. We offer in evidence this copy of the telegram referred to by the witness in his testimony, in connection with a telegram of that date from Mr. Rafael Barletta to Mario Mercado e Hijos.

Attorney Tormes: We object, as the same is immaterial, irrelevant and impertinent, and does not prove anything in issue.

Attorney Sabater: We object on the same grounds.

Judge: Is it a telegram? Copy of a telegram? It is admitted in connection with the testimony of the witness.

Attorney Tormes: We take exception in behalf of all of the defendants.

Judge: Marked Exhibit P of the Plaintiff.

[The document offered and admitted in evidence as Exhibit P of the Plaintiff is faithfully and correctly transcribed and is attached at the end of this transcript as "Exhibit P of the Plaintiff".]

Attorney Ochoteco: Please tell me. If my memory does not fail me, then you, in view of the fact that Mr. Barletta failed to keep the appointment made for January 13, 1937, sent him a telegram on January 14, which was offered in evidence?

Mr. Peralta: Yes, sir.

Q. What further action has been taken? *A.* On January 14, by means of a telegram in answer to the copy just offered in evidence, he made another appointment for Monday.

Q. Monday, when? *A.* Monday. Here it is said "Monday afternoon". Monday fell on the 18th.

Q. Of thirty-seven? *A.* Of 1937, and on Monday, January 18, Barletta appeared to put off his answer until Thursday, January 21, 1937.

Q. For January 21? *A.* Yes, sir, on a Thursday.

Q. What happened on January 21? *A.* On Thursday, January 21, 1937, Barletta again put off his answer to Saturday, January 23, 1937, and on Saturday, January 23, 1937, Barletta failed to come, but he sent a wire to the Central, excusing himself.

Judge: January—

Mr. Peralta: On Saturday, January 23, 1937, when he had agreed to come, he put it off again; he sent again a telegram excusing himself and promising to come during the course of the following week, that is, the week starting on Monday, January 25.

Attorney Ochoteco: Did he come on January 25? *A.* On Monday, January 25, Barletta came to the office and put off again the answer to Monday, February 1, 1937, and on Monday, February 1,—

Judge: To which date did he put off the answer? *A.* To Monday, February 1, 1937, and on Monday, February 1, 1937, he put off the answer to February 3, 1937.

Q. For February— *A.* Three, 1937.

Q. For February 3. *A.* Three; and on February 3, 1937, which was on a Wednesday, he again put off his answer to Friday, February 5, 1937.

Q. For February— *A.* Five, 1937. On February 5, 1937, which was on a Friday, Barletta did not come, but sent a telegram advising that he had been unable to take a decision in connection with the business on account of his mother-in-law being ill, and stating besides that he would let know which day of the following week.

Judge: When did you say that he promised to come again?

Mr. Peralta: One day of the following week, without fixing a day.

Q. I suppose that the testimony of this witness will take longer.

Attorney Ochoteco: It will be longer.

Judge: Let us put it off until tomorrow morning. Another trial has been adjourned to tomorrow morning, in which a witness is missing. I refer to the testimony of a witness in an action hard fought as the present case. And that testimony will take up at least an hour.

Attorney Tormes: We may come at ten o'clock.

Judge: That is why I say that. There is also the opening of a closed will, but that will not take long. So I think that in order not to waste time we might adjourn to 10:30 in the morning. At 10:30 for you to be here. Mr. Peralta must be present at that time, because his testimony will be proceeded with. The court adjourns to tomorrow at nine A.M.

[The court adjourns.]

Session of November 15, 1939.

FURTHER TESTIMONY OF MR. JOSE R. PERALTA.

Judge: Mr. Peralta was testifying.

Attorney Ochoteco: We will request the court leave in order to change the sequence of our evidence, to interrupt the testimony of witness Mr. Peralta and to place on the stand the telegraph operator of Mayaguez.

Attorney Tormes: No objection.

Judge: Then the testimony of Mr. Peralta is interrupted so as to let the other testimony be given. Let the witness be examined.

TESTIMONY OF MISS CLOTILDE GOMEZ.

[The witness is sworn in by the clerk.]

Attorney Ochoteco: Your name.

Miss Gomez: Clotilde Gomez.

Q. Occupation? *A.* Telegraph operator of Mayaguez Playa.

Q. Please examine this paper I hand to you.

[The witness examines the document delivered to her by attorney Ochoteco.]

Judge: That document has not yet been admitted.

Attorney Tormes: Document already examined.

Attorney Ochoteco: What is this paper? *A.* A telegram.

Q. This paper, before it came into your hands, in whose possession was it? *A.* In the possession of the Insular Telegraph.

Q. Did you bring it by order of the court? *A.* By order of the court.

Attorney Ochoteco: Where did you get this paper from, was it on file?

Miss Gomez: In the telegraph office of Mayaguez.

Q. Do you know that of your own knowledge? *A.* Of my own knowledge.

Q. Do not you know who sent this telegram? *A.* I presume, as it was long ago, that it was taken by Mr. Rafael Barletta to my office.

Q. Why do you presume it? *A.* Because everybody who sends a telegram has to sign it when delivering it, and his signature appears crossed out.

Q. Are you acquainted with his signature? *A.* If it is shown to me, as he has sent messages so often, that I am acquainted with it.

Q. Whose signature does this one crossed out resemble? *A.* It looks like the signature of Mr. Barletta.

Q. Do you know Mr. Barletta's handwriting? *A.* I have forwarded for him many telegrams.

Q. This handwriting, whose handwriting does it look to you? *A.* It looks to me as his handwriting, but not the text.

Q. I mean his signature. *A.* I presume it is his; every telegram sent must be signed by the person who deposits it.

Attorney Ochoteco: With the leave of the court—

Judge: What does the signature say?

Miss Gomez: Elvira Olivieri.

Q. The one crossed out, what does it say?

Attorney Tormes: The court has not so far seen the document, and has put the question.

Judge: I have put the question because mention has been made of a signature, and the court is entitled to make the proceedings clear and not to leave any doubt when a question is put. I ask whose signature is it because it might be, instead of that of Barletta, that of somebody else. What do the words crossed out say? *A.* Rafael Barletta.

Q. The purpose of the question was to identify what is stated there.

Attorney Ochoteco: Let it be identified for the purpose of submitting the same in evidence at the proper time. Let us finish with this evidence for the plaintiff. Will the witness kindly read these words with the legend "January 23, 1937"?

Miss Gomez: That it was deposited on that date.

Attorney Ochoteco: And this other india rubber stamp? *A.* That was handed in the office at Mayaguez Playa.

Q. This india rubber stamp, who stamped it? *A.* Myself.

Q. You stamped it? *A.* Yes, sir.

Q. Is this the time it was received? *A.* The same was received at 9:52 in the morning.

Q. Which day? *A.* January 23, 1937.

Q. Are you sure? *A.* Quite.

Q. This is all.

Judge: The other side may examine the witness.

Attorney Sabater: Tell me, madam, how many telegraph offices are there in Mayaguez? *A.* Two.

X-Q. One at the Playa? *A.* Yes, sir.

X-Q. And another in the town?

Miss Gomez: Yes, sir.

Attorney Sabater: In which of the two offices do you work? *A.* Only in Mayaguez Playa.

X-Q. Have you ever worked in the town? *A.* I have not worked in the town for the last fifteen years.

X-Q. Where did you get this telegram in order to bring it to this court? *A.* It was delivered to me by the chief of the office in town.

X-Q. Are you in charge of the file in the town? *A.* There is no file in my office. It is a branch office.

X-Q. Who is the keeper of that file, you or somebody else? *A.* The manager of the telegraph office, Mr. Villegas, of Mayaguez.

X-Q. In the period between 1937 and now, possibly many people may have had to do with the file where this wire was kept? *A.* No, sir.

X-Q. When did you see it for the first time? *A.* After I had dictated it, until yesterday afternoon.

X-Q. Do you know whether anybody else, besides the manager, had to do with the file in the town telegraph office?

Miss Gomez: I think that the only person who has control of the file is the manager of the office.

Attorney Sabater: You say that you know that you have forwarded many telegrams from Mr. Rafael Barletta? *A.* On many occasions.

X-Q. If I place before you several signatures from different people, among which this signature of Mr. Rafael Barletta, could you categorically state which of said signatures was that of Mr. Barletta? *A.* On telegrams, perhaps.

X-Q. But not on deeds? *A.* No, sir.

X-Q. So that you categorically cannot state that you know the signature of Mr. Rafael Barletta? *A.* On telegrams.

Judge: What do you mean "on telegrams"? *A.* That he has affixed his signature to several telegrams in my presence.

Q. Has he signed different papers? *A.* No, sir.

Attorney Sabater: Cannot you positively state that Mr. Rafael Barletta personally took the telegram on that day?

Miss Gomez: Pursuant to the orders from the telegraph office, anybody who hands in a telegram must sign it; must sign a telegram when handing it. There is an order from the government.

Attorney Sabater: Did not Mr Barletta sign the telegram in your presence? *A.* Surely he did, because upon seeing the name of Mrs. Elvira Olivieri thereon, he had to affix his name for me to accept the telegram; otherwise we may refuse to take it.

X-Q. Do not you remember whether it was Mr. Rafael Barletta? *A.* I presume so, because the only signature there is that of Mr. Rafael Barletta.

X-Q. Nor do you know either who crossed out the signature there? *A.* As every extra signature to a telegram must be charged for, I presume that on telling him of the extra charge he meant to cross out that signature so as to pay for the last one only.

X-Q. That is all.

Attorney Ochoteco: That is all.

Judge: You may go.

Attorney Ochoteco: Will you grant me a little more time so as to submit this telegram in evidence?

FURTHER TESTIMONY OF MR. JOSE R. PERALTA.

Attorney Ochoteco: Your name?

Mr. Peralta: Jose R. Peralta.

Q. This is a telegram referred to by the preceding witness; Mr. Peralta, please examine this paper.

[The witness examines the paper handed to him by attorney Ochoteco.]

Q. Have you examined it? *A.* Yes, sir.

Q. Whose signature is this that appears first? *A.* The signature crossed out is that of Mr. Rafael Barletta.

Q. Why are you so positive that this is his signature? *A.* I know Mr. Rafael Barletta's signature.

Q. How have you become acquainted with his signature? *A.* By reason of several negotiations carried out by him in the name of his mother-in-law, Mrs. Elvira Olivieri-Commins, with the firm of Mario Mercado e Hijos.

Attorney Ochoteco: For how many years?

Mr. Peralta: Ever since December, 1934.

Q. Whose signature is the second one? *A.* Elvira Olivieri's.

Q. Are you acquainted with the signature of Mrs. Elvira Olivieri-Commins? *A.* Yes, sir.

Q. How is that? *A.* By reason of the dealings between her and the firm of Mario Mercado e Hijos.

Q. Are you used to see it frequently? *A.* Yes, sir.

Q. Is this the signature of Mrs. Elvira Olivieri-Commins?

Attorney Tormes: We object.

Attorney Ochoteco: I withdraw the question. Whose is this second signature which appears on this document? *A.* The signature of Mrs. Elvira Olivieri-Commins. Now the handwriting does not seem to be hers.

Attorney Ochoteco: How can you tell that this is the signature of Mrs. Elvira Olivieri-Commins.

Mr. Peralta: It does not look to me like the signature of Mrs. Elvira Olivieri-Commins. It looks to me like that of Mr. Barletta himself.

Q. We submit in evidence the telegram that has been referred to in the testimony of the two witnesses, dated January 23. 1937, Mayaguez Playa.

Attorney Tormes: Over our objection, because this is immaterial, impertinent and irrelevant, and because nothing is proven in the action prosecuted herein. By means of this telegram it is sought to prove the alleged agency or representation of Mr. Rafael Barletta, and the record already contains the testimony of a witness for the plaintiff, that is, Mrs. Elvira Olivieri, who testified as to the scope of the activities of Mr. Barletta in connection with her interests.

Attorney Ochoteco: For the purpose of a better understanding of the record, we want to state that the object, among others, pursued in submitting this telegram is in order to clear up the date of the telegram marked Exhibit N, that is, that it was not on January 23, 1936, but on January 23, 1937.

Attorney Tormes: We insist on our objection.

Attorney Sabater: We also object to the submission of this document because we consider it irrelevant, and should the document be submitted in evidence for the purposes of proving an alleged relation of agent and principal between Mr. Rafael Barletta and Mrs. Elvira Olivieri-Commins, we object, because the telegram itself does not show the signature of Mrs. Elvira Oliv-

ieri-Commins, nor does it appear that such handwriting is the handwriting of Mr. Rafael Barletta.

Judge: The court admits the same and will attach to it whatever value it may have in connection with the rest of the evidence. And let it be marked Exhibit Q of the Plaintiff.

Attorney Sabater: We take exception.

Attorney Tormes: We take exception.

[The document offered and admitted in evidence as Exhibit Q of the Plaintiff is faithfully and correctly transcribed and is attached at the end of this transcript as "Exhibit Q of the Plaintiff".]

Attorney Ochoteco: I will request the stenographer to read the last question put to the witness yesterday afternoon.

[The stenographer reads the last question put to the witness on the day before.]

Attorney Ochoteco: Will the witness kindly proceed with his testimony regarding the questions put to him yesterday afternoon?

Mr. Peralta: After the other telegram of February 5, 1937, on February 10, that is, in the course of the following week, a new telegram was received signed by Barletta.

Judge: All these documents are dated in 1937? *A.* Yes, sir. On February 10 another telegram was received signed by Barletta, where he announced his visit for the next day, in which he was saying that he would be present on February 11. On February 11 Barletta did not appear either, but said that he would be present on Friday, February 12. On Friday, February 12, Barletta called at the office and in the presence of Mario Mercado, Jr., and your witness, he told us that Mrs. Elvira Olivieri—

Judge: You are holding a paper and is that to which you are referring?

Mr. Peralta: He told us that Mrs. Elvira Olivieri—

Judge: Which day was that? *A.* Friday, February 12.

Q. Did Barletta come? *A.* Yes, sir. And told us, Mr. Mario Mercado, Jr., and myself, that Mrs. Elvira Olivieri-Commins re-

fused to sell the tracts of land and that she had made up her mind not to sell the tracts of land.

Attorney Ochoteco: Which tracts of land are you referring to? *A.* The portion of the "Indios" estate to which she was entitled after the actual partition between her and her sister.

Judge: Was he Mr. Mario Mercado, Jr.? *A.* Yes, sir. And that on the contrary she was asking for offers to lease.

Q. That was asking offers to lease, who? *A.* Mrs. Elvira Olivieri-Commins.

Q. Did Barletta say that? *A.* Yes, sir.

Judge: Then Mrs. Elvira Olivieri was asking for an offer to lease?

Mr. Peralta: Yes, sir. And that she would give her answer to such a proposal to lease on Monday, February 15. The week that ended February 13 your witness was ill.

Attorney Ochoteco: Which witness do you mean? *A.* Myself.

Judge: Did she then say that she would give an answer to that proposal? *A.* During the week commencing on Monday, February 15.

Q. During the week commencing Monday, February 15, 1937? *A.* Yes, sir. And on Saturday, February 13, your witness on account of illness was absent from his office.

Q. Which day? *A.* On Saturday, February 13, and I was sick during the whole week until February 20, 1937.

Attorney Ochoteco: You were what? *A.* Sick, absent. Absent from the office. During my absence, on February 18, 1937, another telegram was received, signed by Barletta, in which he said: "I will be there tomorrow".

Judge: On which day was it written?

Mr. Peralta: On February 18, 1937. I understand that he was on the 19th in Guayanilla and on failing to meet me in the office he saw Mario Mercado in his office in Ponce.

Q. Who? *A.* Barletta.

Q. On which day? *A.* On the 19th. On the day following the receipt of the telegram. On February 26, 1937, Barletta called

again at the office but he did not come straight to my desk; he went to the office of the auditor of the firm.

Q. On which day? *A.* On February 26, 1937. He went straight to the office of the auditor and handed to him $420 in twenty-dollar bills, of which $200 were to be credited to the current account of Mrs. Eudosina de Barletta with the firm Mario Mercado e Hijos.

Q. How much did he hand? *A.* Four hundred twenty dollars in twenty-dollar bills.

Judge: To pay what—

Mr. Peralta: To be credited to a contract of Mrs. Eudosina B. de Barletta, wife of Mr. Barletta, and the balance of two hundred twenty dollars to cover the amount of a check that had been negotiated and had been returned for lack of funds by the bank drawn against. On that same day, after effecting the above payment, he opened the door to our office but did not go in; standing at the door, while grabbing the door, he told me that he had been unable to come and give an answer in connection with the business of the lease under discussion, because he had been away from Puerto Rico. He said to me that he had paid that four hundred twenty dollars on account and that he thanked us for our courtesy in withholding the check without funds which they had cashed, and that he would call again next day at my office to take up again our talk. Barletta failed to come either on February 27 or on March 1. On March 4 I saw him at Mayaguez, in his residence, where I had called so as to have a talk with him, in view of his delay in giving an answer in the pending negotiations.

Attorney Ochoteco: Did you go to see him together with Mrs. Elvira Olivieri?

Mr. Peralta: I went to meet Barletta. On that day I called at his house, but could not locate him and finally he received me and I saw Mrs. Elvira Olivieri, who was staying in his residence.

Attorney Ochoteco: Did not you see Barletta on March 4? *A.* I saw him later on.

Q. Did you see him later on, on the same day? *A.* Yes, sir.

Q. Did you see Mrs. Elvira Olivieri first? *A.* Yes, sir. I went to pay my respects to Mrs. Elvira Olivieri, in the company of Julio Vidal, from Mayaguez; I went for an exchange of views, and she told me that she had the money to cancel the mortgage. To my question as to where she had found the money, she told me that that was a secret, and that her attorney had warned her not to divulge it. After that, at 10:30 or 11, Barletta came, and I talked with him.

Q. Where? *A.* In the very residence of Mrs. Elvira Olivieri, and he told me of his displeasure by reason of his inability to close the deal.

Q. To which deal was he referring?

Mr. Peralta: The lease, and that he hoped to close it within a week. I did not hear from Barletta until March 6, and I could not locate him again until March 8, when I saw him in the office of attorney Zapater, in company of Mr. Manuel Francisco Lluberas. We met by chance in the office of attorney Zapater. I had a talk with him and he told me that he had in mind to see me on that day or on the next day.

Attorney Ochoteco: What for? *A.* To give an answer in connection with the business.

Q. Which business? *A.* The lease.

Q. Were you talking about a lease? *A.* About the deal, the subject of our conversation since January, of the estates "Juanita" and "Indios". That the business was good and that he thought he could close it that afternoon or on the next day in the morning. He told me this in the presence of attorney Zapater.

Judge: On what date? *A.* March 8, 1937.

Attorney Ochoteco: At what time?

Mr. Peralta: In the afternoon, between 3 and 3:15 in the afternoon.

Judge: In which town? *A.* In Ponce, in the office of attorney Zapater.

Attorney Ochoteco: Do you mean attorney Fernando Zapater? *A.* Yes, sir.

Q. Did Mr. Lluberas accompany Mr. Barletta? *A.* He was in the company of Mr. Lluberas. Lluberas was coming down at that moment and I then got in touch with Barletta. He told me that he had in mind to see me that afternoon, and if not on the next day in the morning, and that he hoped to close the lease business that was pending.

Q. Proceed with your statement. *A.* Afterwards I did not see Barletta until April 6, 1937, in the residence of Mrs. Elvira Olivieri, in Mayaguez Playa.

Judge: Which date? *A.* April 6, 1937.

Q. Of which year? *A.* Nineteen hundred thirty-seven. That is, in connection with the demand served by attorney Porrata on Mrs. Elvira Olivieri in connection with a business deal between this lady and Mr. Manuel Francisco Lluberas and sisters and with Mr. Emilio Blasini.

Attorney Ochoteco: Please answer the following question before proceeding with your testimony: In view of what was Mr. Barletta closing or discussing the terms of a lease in behalf of Mrs. Elvira Olivieri-Commins with Mario Mercado e Hijos?

Attorney Tormes: We will object, because there is involved an alleged agency, and concerning such alleged agency the principal already testified yesterday and explained to the court the scope of such agency and the mission entrusted by her to Mr. Barletta.

[Attorney Tormes argues at length on his objection.]

Attorney Ochoteco: We respectfully sustain, without prejudice to the opinion of the court, that there is now more than sufficient evidence admitted by this court for reaching now the conclusion, for the purposes of the admissibility of the evidence, that Mr. Rafael Barletta was acting in this specific case, and in connection with Mario Mercado e Hijos, as a special agent, if that is the word, of Mrs. Elvira Olivieri-Commins.

[Attorney Ochoteco argues at length thereon.]

Judge: The question ought to be changed.

Attorney Ochoteco: Did Mr. Barletta ever mention to you that

somebody else was interested in the purchase or lease of the "Indios" and "Juanita" estates?

Attorney Tormes: We object as being immaterial. The statements of Mr. Barletta in such a way cannot prejudice Messrs. Lluberas and Blasini, third parties represented by us.

[Attorney Tormes argues on his objection.

[Attorney Ochoteco argues thereon.]

Judge: Objection sustained. If such question were put under circumstances that made it clearly admissible, the court would admit it, but the term "ever" is very vague, very indefinite. Objection sustained.

Attorney Ochoteco: Please tell me, do you know whether firm of Mario Mercado de Hijos, at any time prior to or subsequent to March 9, 1937, received any written notice or otherwise from Mrs. Elvira Olivieri-Commins, or from Mr. Barletta, from Mr. Rafael Barletta, that Mrs. Elvira Olivieri had received offers to purchase or lease in connection with the parcels "Juanita" and "Indios"?

Judge: This question was put yesterday.

Attorney Ochoteco: I put it to Mrs. Elvira Olivieri.

Judge: You may answer the question.

Mr. Peralta: In no occasion, either before or after March 9, 1937, neither verbally nor in writing, nor through any other channel, was the firm served with the notice from Mrs. Elvira Olivieri-Commins, for either selling or leasing these estates to a third person.

Attorney Ochoteco: Please tell me, and pardon me for interrupting your testimony, the course of your testimony. In your testimony you have stated that on a certain date you had gone to Mayaguez? *A.* Yes, sir.

Q. To the residence of Mrs. Elvira Olivieri-Commins? *A.* Yes, sir.

Q. Be kind enough to proceed with your testimony where you left it off. *A.* On April 6, 1937, I accompanied attorney Pedro M. Porrata, together with Mr. Pastor S. Mandri, Mr. Gilberto Barbosa-Sicardo, Mr. Ulisis Petrilli and Mr. Neri Vazquez, all of

them from Ponce, except Mr. Sicardo, who resides in Catano. We went to the residence—

Judge: When was that?

Mr. Peralta: On April 6, 1937. We called on Mrs. Elvira Olivieri-Commins, in the Playa known as "Guanajibo", in Mayaguez, on the road leading to the "Correccional". We reached the residence of the above lady in the afternoon, between two and three P.M., and attorney Porrata, Mr. Mandri and myself went in.

Attorney Ochoteco: What for did you go there? *A.* To accompany attorney Porrata, who was carrying a certain amount of cash and who was going to serve a demand in connection with the sale made by Mrs. Elvira Olivieri to Messrs. Lluberas, of the parcel belonging to Mrs. Elvira Olivieri-Commins out of the "Indios" estate.

Q. In what capacity were you serving the firm? *A.* As manager.

Q. And Mr. Pastor Mandri? *A.* Its director.

Q. And attorney Porrata? *A.* Our attorney, who went there as a notary to serve the demand.

Judge: Mr. Pastor Mandri was there, and who else?

Mr. Peralta: Attorney Porrata, and Mr. Ulises Petrilli as witness.

Q. From Ponce? *A.* Yes, sir. He went to serve as a witness. Neri Vazquez, was also a witness in connection with the service of the demand, and Mr. Barbosa Sicardo, from Catano, a stenographer, to take down the answer from Mrs. Elvira Olivieri to the demand to be served by the notary. We got there about two or three.

Attorney Ochoteco: How much were you carrying? *A.* Forty-five thousand dollars in cash.

Q. Bank notes? *A.* Yes, sir. And we reached the residence.

Q. Who was carrying the money? *A.* The notary. And we reached the residence of Mrs. Elvira Olivieri between two and three P.M., and we found her alone in the parlor of her residence and told her the purpose of our visit. Attorney Porrata handed

to her a copy of the notarial demand to be served while he was reading another copy, and asked her leave to call the stenographer and the witnesses into the parlor, to be present at the notarial act, which permission was courteously granted by Mrs. Elvira Olivieri. During the reading, a conversation sprang between Mrs. Elvira Olivieri, the notary, Mr. Mandri and your witness. And during the conversation, which was taken down by the stenographer Mr. Barbosa-Sicardo, she admitted that about January, 1937—

Attorney Tormes: We object to any admission from Mrs. Elvira Olivieri, especially as to the defendants Lluberas and Blasini. Any admission from that lady is inadmissible for the purpose of affecting the title as third parties of Messrs. Lluberas and Blasini, the subject matter of the action against them. Yesterday Mrs. Elvira Olivieri took the stand as a witness for the plaintiff, and was sworn in, and concerning any admission from her she ought to have been examined at the time. In our opinion no other evidence regarding such admission should be submitted.

[Attorney Tormes argues on his objection.

[Attorney Tormes cites Section 35 of the Law of Evidence; *Muniz* v. *Cortes*, 33 P.R.R. 276; *Marrero* v. *Skerret et al.*, 17 P.R.R. 540; and Jones on Evidence, s. 241, pages 461 and 462.]

Attorney Sabater: We also object to the witness testifying on admissions of Mrs. Elvira Olivieri-Commins on the ground that the person who made the alleged admission was made to take the stand here as a witness for the plaintiff; she was examined at length, and I perfectly remember that my colleague Ochoteco asked her whether she remembered the day on which Mr. Peralta had called at her home, that is, April 6, 1937, and I remember her words when she said: "On the day they forced their way into my home", and no question was put to her on such admission. He might have brought up the former evidence and then this corroboration of such admission; but in this way we think it is inadmissible.

[Attorney Sabater argues on his objection.]

Attorney Ochoteco: Please the court, in our opinion the point is not as material as my distinguished colleague thinks.

[Attorney Ochoteco argues thereon, and cites Section 397 of the Code of Civil Procedure, subdivision 3.]

Attorney Tormes: In order to gain time, let the witness proceed with his testimony so that the court might see.

Attorney Ochoteco: Is the objection withdrawn?

Attorney Tormes: I had not started to say—

Judge: Let us hear the argument, because if the point comes up later on—

Attorney Ochoteco: Does not my colleague withdraw his objection?

Judge: The first point to be discussed is the matter of the date, whether it was prior or subsequent.

Attorney Ochoteco: I was following my colleague in the order of his argument.

Judge: It is for the purpose of simplifying.

[Attorney Ochoteco continues arguing thereon at length.]

Judge: It is now late. It is 5:08 P.M., and we have been working ever since nine A.M. Of course, the court might settle this point now, but as the parties have offered to submit authorities, the court puts off this question to be settled in the morning, so as to give the parties an opportunity to submit authorities. Therefore the point is left pending. Let the stenographer mark the question so as to find it tomorrow if he has to read out the question. The incident as to the admission is left pending. Mr. Peralta will continue tomorrow.

SESSION OF NOVEMBER 16, 1939.

Judge: There was pending decision an objection to the question put to the witness Mr. Peralta. Let Mr. Peralta proceed testifying. Is there any further jurisprudence to be submitted before?

Attorney Ochoteco: It would be better to hand to your Honor the text of all the authorities.

Judge: You might as well read it so as to be heard by the other side, since everybody here knows English.

Attorney Ochoteco: Wigmore on Evidence, volume 2, page 518, Sections 1085 and 1086.

[Attorney Ochoteco reads Sections 1085 and 1086 of Wigmore on Evidence, and argues thereon at length.]

Judge: The other side?

[Attorney Tormes argues thereon at length, citing 170 Cal. 631.]

Judge: Yesterday there was a wide discussion on the arguments from both sides, on the cases cited and on the jurisprudence, and of course the court thinks in view of the way in which the juridical point has been submitted . . . paragraph 11 of the complaint actually alleges collusion, and deliberate purpose of defrauding the plaintiff. And as it now happens that the plaintiff is submitting its evidence in support of its complaint, the court, in accordance with the jurisprudence just cited, especially Section 1086 of Wigmore on Evidence, page 611, volume 2, second edition, overrules the objection made by the defendant to the question and allows the witness to answer.

Attorney Tormes: We take exception on the grounds already stated.

Attorney Sabater: We take exception in behalf of my defendant clients.

[Attorney Sabater argues thereon and cites 36 Cal. 205 and 38 Cal. 278.]

Judge: The witness may answer the question.

Mr. Peralta: About the month of January, 1937, subsequent to the death of Mr. Delgado, who was the candidate to the mayoralty of the city of Ponce, she had received a visit from Mrs. Pasarell-de-Delgado, who finding her sick, asked her what was the matter with her, and Mrs. Elvira Olivieri answered that she was worrying a lot on account of some obligation secured by her estates, and that was worrying heavily on her. Mrs. Pasarell-de-Delgado told her not to worry—

Attorney Tormes: Just a moment—

Attorney Ochoteco: It is all right. Please testify to what you know, of what Mrs. Pasarell said—

Attorney Sabater: We object.

Mr. Peralta: Mrs. Elvira Olivieri said that Mrs. Elena Pasarell-de-Delgado offered her money.

Attorney Tormes: We move to strike out what she might have said.

Attorney Ochoteco: What she said. *A.* I am stating what Mrs. Elvira Olivieri said.

Q. You cannot state what Mrs. Elvira Olivieri said that Mrs. Elena Pasarell may have said. You may say what Mrs. Elvira Olivieri did by virtue of what Mrs. Elena Pasarell said, without testifying to what she may have said.

Mr. Peralta: Mrs. Elvira Olivieri told me that she had got the money from that lady.

Attorney Ochoteco: From what lady? *A.* From Mrs. Pasarell-de-Delgado, in order to cancel the mortgage, and that such money had been secured by her on the condition imposed by Mrs. Delgado herself that the estate "Cupey"—

Attorney Tormes: He cannot testify as to the terms imposed by that lady.

Attorney Ochoteco: You cannot testify to what Mrs. Pasarell may have said to Mrs. Elvira Olivieri. You may testify as to what Mrs. Elvira Olivieri told you that she had done and that she was bound to do. *A.* She told us what she had done as the result of this conversation with this lady; that she had borrowed the money from her, and that said money had been given on the expressed condition that the estate "Cupey" be sold to her children, Messrs. Lluberas, here present.

Attorney Tormes: We move to strike out. Mrs. Elvira Olivieri appears as saying what was said to her by Mrs. Elena Pasarell, who is not a witness for the defendants.

Attorney Ochoteco: We first consented, because we understood that my colleague was right in objecting to the witness testifying

as to what Mrs. Elena Pasarell had said to Mrs. Elvira Olivieri, but now the situation is different. Now the witness is testifying to what Mrs. Elvira Olivieri told him that she was bound to do or had done.

[Attorney Ochoteco argues thereon.]

Attorney Tormes: We beg the court to bear in mind that these statements were made on April 6, 1937, subsequently to the signing of the deed before Lopez-de-Victoria, deed number 40, which was signed on March 9, 1937, and now he is referring to what Mrs. Elvira Olivieri did as a result of an imposition, of a warning or of an agreement made by her with Mrs. Elena Pasarell, widow of Delgado.

[Attorney Tormes argues thereon.]

Judge: The court admits the statements.

Attorney Tormes: We take exception.

Attorney Sabater: We take exception.

Judge: Please proceed.

Mr. Peralta: That she should sell the estate to the Lluberas brothers and that the estate "Juanita"—

Attorney Ochoteco: Do you mean the defendants? *A.* Yes, sir. And besides that the "Juanita" estate should be leased to the nephew of Mrs. Elvira Olivieri and son-in-law of Mrs. Pasarell, Emilio Blasini, a co-defendant herein. I want further to explain that in making reference to the "Cupey" estate I refer to the parcel belonging to Mrs. Elvira Olivieri in the partition of the property belonging to her and her sister, a part of the estate "Cupey" or "Indios".

Judge: "Cupey"? *A.* Yes, sir. A portion of the estate known as "Indios". During this conversation there came out from one of the rooms of the house a son of Mrs. Elvira Olivieri, a dentist by profession, and called his mother's attention to the fact that her statements were being taken down by a stenographer, and forbade the stenographer to proceed. He forbade the stenographer to proceed with the taking of the notes; the doctor further told his mother that she should not testify to anything unless it

was assisted by her attorney, Sabater. The doctor himself went out to fetch Sabater and returned shortly afterwards, saying that Sabater was at that moment in the District Court of Mayaguez, or in one of the Mayaguez courts, on professional duties, for which reason he was unable to come. Some two hours later on, when it was almost dark, attorney Sabater came and the notarial business of attorney Porrata terminated. I remember that on the street, in a typewriter and lit up by matches, the demand was typed, terminated and signed and each of us went home.

Attorney Tormes: We move to strike out everything stated by the witness in this connection because there are involved statements and testimony given subsequent to March 9, 1937, by which time Mrs. Elvira Olivieri had already sold the "Indios" estate and leased her "Juanita" estate to Emilio Blasini, as the acts involved took place subsequently, without either Blasini, or any of the other defendants by the name of Lluberas, being present during such testimony.

Attorney Ochoteco: We submit the point.

Attorney Sabater: We also move to strike out from the testimony of the witness the last statement in connection with the admission of Mrs. Elvira Olivieri.

[Attorney Sabater argues thereon.]

Judge: The other side?

Attorney Ochoteco: We submit the point.

Judge: Motion to strike out overruled for the reasons stated.

Attorney Tormes: We take exception.

Attorney Sabater: We take exception.

Judge: Did you say that during the conversation Mrs. Elvira Olivieri-Commins was told not to make any further statement until the arrival of attorney Sabater?

Mr. Peralta: Yes, sir.

Judge: Jose Sabater?

Attorney Sabater: My name is Jose O. Sabater.

Judge: To whom were you referring? *A.* To the father of the gentleman, without the "O". There is a detail I want to explain.

All these events that I am reciting and repeating before the Honorable Court, in connection with the call made on April 6, 1937, at the home of Mrs. Olivieri—

Attorney Tormes: We object to the witness' statements on his own account.

Judge: Do not make statements unless you are asked.

Mr. Peralta: It is a detail that I had overlooked.

Attorney Ochoteco: Please answer to the questions put to you. *A.* During the course of the conversation Mr. Rafael Barletta arrived, and the dentist told Barletta that since he had been involved in those matters connected with the lease of the "Juanita" estate and the sale of the "Indios" estate, he should continue—

Attorney Tormes: We move to strike out as being immaterial. The dentist, doctor Blasini, is not a party to this action and anything said regarding him is quite immaterial, and likewise what Barletta might have said to him is not an evidential element.

Attorney Sabater: We likewise move to strike out.

Attorney Ochoteco: We submit the question.

Judge: The statements are stricken out.

Attorney Ochoteco: We take exception. Now, to the witness, do you know the estates "Indios" and "Juanita"?

Mr. Peralta: Yes, sir. I know them.

Attorney Ochoteco: Personally? *A.* Yes, sir.

Judge: Do not forget that today is the last day, and that you have to hurry up a little.

Attorney Ochoteco: Do you know them personally? *A.* Yes, sir, I know them personally.

Q. Can you tell me how much that estate was worth around the months of February or March, 1937? *A.* The value of this estate, as far as "Juanita" is concerned, owing to the fact that it has twice the area of cane land, is twice as much, as material values are concerned, as the "Indios" estate, and when I refer to the "Indios" estate I mean that part thereof called "Cupey".

Attorney Tormes: I move to strike out the answer as impertinent and irrelevant.

Attorney Ochoteco: We submit it.

Judge: Motion denied.

Attorney Tormes: We take exception.

Attorney Sabater: Very respectfully we take exception.

Judge: Could you state the amount of the value?

Attorney Ochoteco: He says that it is twice as much. Did the witness say twice as much?

Mr. Peralta: Yes, sir. That the "Juanita" estate is worth twice as much or more than the parcel known as "Cupey", part of the "Indios" estate

Q. Do you mean the interest therein belonging to Mrs. Elvira Olivieri? *A.* Yes, sir. That is, such part of it as was sold to the Lluberas brothers, in comparison with the "Juanita" estate, leased to Mr. Blasini.

Q. Did you say that you are assistant manager of the Banco de Ponce? *A.* Yes, sir.

Attorney Tormes: Admitted.

Attorney Ochoteco: From your banking experience, could you tell us the usual rate of interest on loans?

Attorney Tormes: I object.

Attorney Ochoteco: A long-term loan, and a short-term loan, in banking parlance; what is the usual rate of interest on the larger one or the lesser one, according to the longer or shorter term of the loan?

Attorney Tormes: We object. All such transactions are subject to circumstantial needs. There is no fixed rule for closing a deal.

[Attorney Tormes argues thereon.]

Judge: The other side?

Attorney Ochoteco: In our opinion the question is pertinent. We are at this moment, as expressed by the Supreme Court, trying to prove a certain action of a certain nature, and we think that all these elements of proof constitute the evidence on the action.

[Attorney Ochoteco argues thereon.]

Judge: The question is admitted.

Attorney Tormes: We take exception as not being in issue.

Attorney Sabater: We object, and we take exception at the same time, to the admission of the question.

Judge: Let it be recorded. Objected to first.

Mr. Peralta: From my experience in the banking business for more than fifteen years, I can say that the loan market in Puerto Rico is controlled by the market in New York. New York is the banking center of America, and second to the London market. For that reason, in the case of colateral or mortgage security, for short terms, the rate of interest is pretty low. For instance, loans secured by Government bonds, at short terms, for fifteen days, for twenty days or for a month, are obtainable at the rate of one per cent annually, and the practice in Puerto Rico is controlled by the practice in New York.

Judge: Please proceed. Any further question?

Attorney Ochoteco: That is all.

Attorney Tormes: We want to state for the purpose of the record that during the whole day of yesterday and so far today Mrs. Elvira Olivieri-Commins has not appeared in court because she stayed in her home in Yauco, pending to be called. And that is why she is not present in court. Does my colleague accept the statement?

Attorney Ochoteco: Yes, sir. And we are ready to do anything for her comfort.

Cross Examination.

Attorney Sabater: Please, Mr. Peralta, do you remember, about February 23, 1938, in a case entitled number civil 1086, ejectment proceeding, brought by Manuel F. Lluberas against Mario Mercado e Hijos, defendants, do you remember having testified on that date before this court?

Mr. Peralta: I remember the case, and I remember that I testified, although I could not for certain tell you that it was on that date.

Attorney Sabater: Do you remember more or less that you testified? A. Yes, sir.

Attorney Ochoteco: We admit that it was on the date referred to by my colleague.

Attorney Sabater: February 23, 1938. We would like the answer to be read out to us, made to the question from my colleague in connection with the admissions of Mrs. Elvira Olivieri-Commins. What she told him when they were in Mayaguez.

Judge: Let the stenographer read the answer in question.

Stenographer [reading from his notes]:

"About the month of January 1937, subsequent to the death of Mr. Delgado, who was the candidate to the mayoralty of the city of Ponce, she had received a visit from Mrs. Pasarell-de-Delgado, who finding her sick, asked her what was the matter with her, and Mrs. Elvira Olivieri answered that she was worrying a lot on account of some obligation secured by her estates, and that was worrying heavily on her. Mrs. Pasarell-de-Delgado told her not to worry—

"Attorney Tormes: Just a moment—

"Attorney Ochoteco: It is all right. Please testify to what you know, of what Mrs. Pasarell said—

"Attorney Sabater: We object.

"Mr. Peralta: Mrs. Elvira Olivieri said that Mrs. Elena Pasarell-de-Delgado offered her money."

Attorney Sabater: Is this what you testified?

Mr. Peralta: Yes, sir.

X-Q. Now, do you remember having testified, having made the following statement in that ejectment proceeding: question from attorney Ochoteco, "Who were present?" "Those present there were attorney Porrata, Mr. Pastor Mandri, Mr. Ulises Petrilli, Mr. Sicardo, this young man here, a gentleman by the surname of Vazquez, from Ponce, whose name I cannot remember, the witnesses and myself." Question by attorney Ochoteco, "Does Mr. Peralta remember the conversation between you and her?"

You answered, "On the first or on the second occasion?" Attorney Ochoteco, "On the second one." Your answer was, "We reached there between two and three in the afternoon, more or less. The lady was by herself and attorney Porrata, in the performance of his notarial duties, handed to her a notarial act of demand. She started reading it herself, and to questions from attorney Porrata said that she was very sorry that she had not been able to make that deal with Mario Mercado e Hijos, etc." You went on testifying, "Mrs. Elvira Olivieri said that Mrs. Elena Pasarell was going to let her have the money on condition that she sold her the 'Indios' estate in order to help her boys, that is, the Lluberas-Pasarell brothers, and that she leased her the 'Juanita' estate." Do you remember having testified that?

Attorney Ochoteco: For the purpose of the record only, we object to the question, because when we attempted to go into that matter involved in this question, my colleague objected and we were prevented from going into that matter, that is, that the witness should speak of what Mrs. Elvira Olivieri had told him, and now it appears that my colleague wants to go into that matter that was barred to us.

Attorney Sabater: Question withdrawn.

Judge: If the question is withdrawn, no discussion is necessary.

Attorney Sabater: That is all.

Judge: Then, has the attorney finished the cross-examination?

Attorney Tormes: We have to cross-examine the witness ourselves.

Judge: Attorney Sabater has finished.

Attorney Tormes: Mr. Peralta, on December 15, 1936, did the firm Mario Mercado e Hijos hold a lease from Mrs. Elvira Olivieri on her property known as "Juanita" and "Indios"? *A.* On December 15, 1936, yes, sir.

X-Q. How much was she paid as rental? *A.* She was paid five thousand dollars for the whole of the "Indios" estate, and three thousand dollars for the whole of the "Juanita" estate.

Attorney Tormes: How much was her share in that rental?

Mr. Peralta: I presume that she received half of it.

Attorney Ochoteco: I move to strike out the presumption. Plaintiff should not prove its case lying on presumptions.

Attorney Tormes: I am cross-examining.

Attorney Ochoteco: I object to the witness testifying on presumptions.

A. They (the ladies) divided between themselves the amount received.

Attorney Tormes: Are you familiar with the accounting of Mario Mercado e Hijos? *A.* Yes, sir.

X-Q. At that time, when these rentals were paid to Mrs. Elvira Olivieri-Commins, under this lease, was there any contract between Mrs. Elvira Olivieri and Mario Mercado e Hijos? *A.* Yes, sir, with a debit balance as a rule. And today—

Attorney Tormes: I move to strike out the "today". *A.* The debit balance at that time.

Judge: At what time?

Mr. Peralta: December 15, 1936.

Attorney Tormes: Was it customary for Mrs. Elvira Olivieri to issue checks chargeable to her account against Mario Mercado e Hijos?

Attorney Ochoteco: We object. We have not put any question in that respect during the examination. We have not put any question regarding the lease to Mario Mercado e Hijos from Mrs. Elvira Olivieri-Commins. We have not put any question regarding such particular, and in the second place we fail to see any materiality regarding this examination concerning contracts between Mrs. Elvira Olivieri-Commins and Mario Mercado e Hijos, and balances on a certain date, or whether or not any payment was made.

[Attorney Ochoteco argues at length on his objection.]

Attorney Tormes: There is pending admission a letter alleged to be subscribed by Mrs. Elvira Olivieri-Commins, that has not been marked for exhibit and which bears upon a warrant of payment.

Judge: For such purpose the question is admitted.

Attorney Tormes: I am satisfied with the testimony on that particular. There are pending admission by the court these two exhibits, that is, a letter signed by Mrs. Elvira Olivieri-Commins and a letter signed by Mr. Rafael Barletta, and I have already examined him about that.

Attorney Ochoteco: Is that all?

Attorney Tormes: No. Tell me, on the occasion of the call on April 6, 1937, made by you and all those other people, at the home of Mrs. Elvira Olivieri-Commins, and that one Gilberto Sicardo-Barbosa, or Barbosa-Sicardo, was with you, did you warn Mrs. Elvira Olivieri-Commins that her testimony was going to be taken down by the stenographer?

Mr. Peralta: Yes, sir. The notary warned her.

X-Q. I have not asked you regarding the notary.

Attorney Ochoteco: The witness is going to explain his answer, and he has said, "Yes, sir. The notary."

Attorney Tormes: My question has nothing to do with the notary.

Judge: Please proceed.

Attorney Tormes: Tell me, it seems to me to have heard you say that you talked about selling, or buying or selling, on the part of Mrs. Elvira Olivieri, such property as late as March 4, 1937?

Mr. Peralta: I do not think I have said so. You got it wrongly.

X-Q. How long were you talking about your buying the "Juanita" and "Indios" estates? *A.* As regards the purchase, that is, of the "Cupey" parcel, the first conversations took place on January 4, 1937.

X-Q. When was this sale discussed? *A.* Mrs. Elvira Olivieri discussed the sale about February 12, 1937.

X-Q. Discussed what— *A.* The sale.

X-Q. Then the other conversations referred to the lease? *A.* Yes, sir.

X-Q. This is sufficient. Nothing further now with the witness.

Attorney Sabater: That is all.

Attorney Ochoteco: I am going to put you a question. Please tell me, when my colleague Tormes asked you whether Mrs. Elvira Olivieri-Commins had been warned as to the fact that her statements were going to be taken down by the stenographer, you said: "Yes, sir", something to this effect, "The notary warned her", and you were then interrupted by my colleague. What was it you were going to say?

Mr. Peralta: I was going to say again that when we called on this lady on April 6, 1937, the notary, Mr. Mandri and your witness went into the house and the notary delivered to her a copy of the demand.

Attorney Tormes: This has already been taken down. *A.* The notary asked her leave to call the stenographer to take down the notes.

Judge: You had already stated that.

Attorney Ochoteco: We submit in evidence a letter of December 15, 1936, from Mrs. Elvira Olivieri-Commins to Mario Mercado e Hijos.

Attorney Tormes: We object to that, to the admission of this letter of December 15, because the same is irrelevant and immaterial, and because it does not constitute an evidential element to be of any use in this trial.

Judge: Let me see the letter.

Attorney Ochoteco: As regards the last paragraph.

Judge: What is the objection?

Attorney Tormes: That such letter is irrelevant, immaterial and does not constitute an evidential element in any way.

Attorney Sabater: If it should appear from the text of the letter that Mrs. Elvira Olivieri-Commins is requesting the payment of a warrant from Mario Mercado e Hijos of a certain amount of money, such thing has nothing to do with the complaint filed in the present case; and as to the negotiations alleged to be carried by Mr. Barletta, concerning this particular it has been stated by the same witness Mr. Peralta that on some occasions Mr. Barletta used to go and make requests and was carrying certain private

negotiations with the firm Mario Mercado e Hijos, and this proves really nothing.

[Attorney Sabater argues on his objection.]

Judge: The other side?

Attorney Ochoteco: We submit it as a further evidence of the agency given by Mrs. Elvira Olivieri-Commins to Mr. Rafael Barletta, regarding the last paragraph. This is one of the grounds for introducing this letter, and on this sole ground the same is admissible.

Judge: The court admits it as circumstantial evidence, to be given any probatory value that it may have in connection with the evidence.

Attorney Tormes: We take exception on the stated grounds.

Judge: Let it be marked Exhibit R.

[The document submitted and admitted in evidence as Exhibit R of the Plaintiff is literally copied and is attached at the end of this transcript, as "Exhibit R of the Plaintiff".]

Attorney Sabater: We take exception.

Attorney Ochoteco: I submit in evidence a letter from Mr. Rafael Barletta to the firm Mario Mercado e Hijos, dated February 6, 1937.

Attorney Tormes: Our objection on the same grounds.

Attorney Sabater: Our objection too.

Attorney Tormes: On the grounds of being irrelevant and because it does not constitute an evidential element, from which the court may draw any inference.

Judge: For which purpose is it submitted?

Attorney Ochoteco: In connection with the testimony of Mr. Peralta regarding the call made on him by Mr. Barletta, in behalf of Mrs. Elvira Olivieri Commins, in connection with a wire admitted in evidence to this effect.

Judge: Admitted as circumstancial evidence, to be given any probatory value that it may have, and is marked Exhibit S.

Attorney Sabater: We take exception.

Attorney Tormes: We take exception.

[The document submitted and admitted in evidence as Exhibit S of the Plaintiff is literally transcribed and attached at the end of this transcript as "Exhibit S of the Plaintiff".]

Attorney Ochoteco: That is all with the witness.

Judge: Any further question?

Attorney Tormes: That is all with the witness.

Judge: You may withdraw.

TESTIMONY OF ATTORNEY PEDRO M. PORRATA.

Attorney Ochoteco: Your name, please.

Attorney Porrata: Pedro M. Porrata.

Q. Your profession? *A.* Attorney at law.

Q. Do you know Mrs. Elvira Olivieri Commins? *A.* Yes, sir. I had the honor to become acquainted with her for the first time in her home in the city of Mayaguez.

Q. At Mayaguez? *A.* Yes, sir.

Q. On what time? *A.* I think it was on April 6, 1937.

Q. Did you call on her alone or accompanied? *A.* On that day I was accompanied.

Q. By whom? *A.* Accompanied by Mr. Pastor Mandri, manager of the Rufina Central, belonging to Mario Mercado e Hijos, manager of Mario Mercado e Hijos; by Mr. Jose Ramon Peralta; by Mr. Ulises Petrilli; by Mr. Neri Vazquez, and by the stenographer, who at the time was my stenographer, Mr. Barbosa-Sicardo.

Attorney Ochoteco: What was your business with Mrs. Elvira Olivieri-Commins?

Mr. Porrata: On account of a notarial act drawn up by me, for the purpose of serving on that lady a demand, requesting her to make a certain assignment to the firm Mario Mercado e Hijos.

Q. As a result of the service of a demand?

Judge: There is a paper submitted in evidence. Make reference to the paper in order to save time.

A. I went to serve a demand, and the notarial act of demand speaks for itself.

Attorney Ochoteco: Will the witness be kind enough to testify as to what took place when you arrived at the house of Mrs. Elvira Olivieri-Commins, as far as she was concerned? *A.* We reached the house of Mrs. Elvira Olivieri-Commins and there I was introduced to her by Mr. Pastor Mandri.

Q. Did you carry with you any sum of money? *A.* I had with me $46,000.

Judge: I beg your pardon—

Mr. Porrata: I was introduced to her and she begged us to come in. She sat down in front of me, and Messrs. Peralta and Mandri on a canape by our side. I then told her the purpose of our trip, of my call, and she immediately started explaining to me about Mr. Mario Mercado, that she had a great regard for the Mercado family—

Attorney Ochoteco: Do you remember her statements made to you? *A.* Yes, sir.

Q. Please— *A.* In connection—

Attorney Tormes: We object on the same grounds of our objection to the testimony of the witness Jose (R. Peralta).

Attorney Sabater: We also object and reproduce the same objection as before.

Judge: The court admits the testimony.

Attorney Tormes: We take exception.

Attorney Sabater: We take exception.

A. After listening to her for a few moments, I said to her: "Madam, would you be so kind as to allow me to bring two witnesses and a stenographer which I have with me", and she said: "Of course, I shall be very pleased." Then I told her: "The stenographer, madam, is going to take stenographic notes of any statements made by you in connection with this demand." Then, in answer to my questions, she said that Mrs. Pasarell, a widow, mother of Mr. Francisco Lluberas, Elena Pasarell, widow of Lluberas, had been in Mayaguez; that Mrs. Lluberas had offered to buy from her the "Indios" estate for $40,000, and that she

had made that offer on condition to lease also the "Juanita" estate.

Attorney Tormes: We object on the same grounds because he is stating what Mrs. Elena Pasarell had stated.

Judge: Let the statements made by Mrs. Elena Pasarell be stricken out.

Mr. Porrata: That was the answer she gave me. She told me that she had offered to buy the "Indios" estate from her.

Attorney Ochoteco: Do not repeat what Mrs. Elvira Olivieri said that Mrs. Elena Pasarell had stated to her. You may state what Mrs. Elvira Olivieri told you and why she had acted that way.

Mr. Porrata: She told me that she had offered to buy from her the "Indios" estate for $40,000.

Attorney Ochoteco: Did she mention anybody? *A.* Yes, sir.

Q. Whom did she mention? *A.* Mrs. Elena Pasarell, widow of Lluberas.

Q. This lady called Elena, if I am not mistaken, is Mrs. Elena Pasarell-de-Delgado? *A.* Yes, sir.

Q. Is she the same? *A.* Yes, sir. She was the wife of Mr. Delgado, who was a candidate to the mayoralty of Ponce. I will better identify her as the mother of Mr. Francisco Lluberas. At that time, she had promised both to lease the "Juanita" estate and to sell the "Indios" estate.

Q. The estate "Indios", to whom? *A.* To Messrs. Lluberas-Pasarell.

Q. And the "Juanita" estate? *A.* To Emilio Blasini. I then, reading from the deed, told her, "Mrs. Elvira Olivieri, there is a clause whereby you bound yourself to notify Mario Mercado e Hijos regarding such deal." She then said to me, "I promised to keep the offer as a secret, and I am a woman who keep my word, and I would prejudice those people if I mentioned names".

Attorney Ochoteco: Which people?

Mr. Porrata: Lluberas-Pasarell, who according to her had made the offer. Then, while she was answering my questions, her son

came up. I was doing my duty as a notary, the mission with which I had been charged, and I told her so, and whether she needed anybody to assist her, and she told me that that was not necessary, that she had sold the estate, she had executed the deed and that she was not worried. Then I myself advised her, and her son went to the District Court of Mayaguez to fetch attorney Sabater. I then explained to attorney Sabater—

Q. All right. Then, what happened? *A.* I would like to explain—

Q. Anything you may say is not admissible.

Judge: You are not now an attorney. You are now a witness.

A. Then attorney Sabater came and he requested that any answer coming from Mrs. Elvira Olivieri should be agreed upon between him and myself.

Attorney Tormes: I move to strike out what is stated regarding such agreement.

Judge: Motion granted.

Mr. Porrata: That the answer should be the one contained in the record, and yet I told Mr. Sicardo, the stenographer—

Attorney Tormes: Just a moment—

A. To transcribe the stenographic notes—

Attorney Ochoteco: Who dictated the return of the service which appears in the notarial act? *A.* It was dictated by attorney Sabater.

Q. In reference to what— *A.* I want to explain that. When attorney Sabater arrived, I willingly consented to take the answer that the attorney might suggest.

Attorney Tormes: We move to strike out all this on account of being self-serving evidence.

Judge: To strike out what?.

Attorney Tormes: Anything that might have been done by attorney Sabater.

Judge: The court understands that the return of the notarial act, that is, the answer, was dictated by attorney Sabater, and here it is. Everything else is stricken out.

Attorney Ochoteco: Tell me, colleague, when you were acting as a notary in the service of the notarial act upon Mrs. Elvira Olivieri Commins, you said that one of her children came up?

Mr. Porrata: Yes, sir. From my information, she had two sons, a physician and a dental surgeon.

Q. To whom of the two have you referred? *A.* To the dental surgeon, this gentleman here.

Judge: Will you tell me his name? *A.* Domingo Blasini Olivieri.

Attorney Ochoteco: That is all.

Judge: Cross-examination?

Attorney Tormes: I move to strike out the whole testimony as irrelevant, immaterial and impertinent and because the same does not constitute any evidential element to throw light on this matter.

Attorney Sabater: The same objection.

Attorney Ochoteco: We simply object.

Judge: The court simply denies it.

Attorney Tormes: We take exception.

Judge: Please proceed.

Attorney Ochoteco: We move for a two-minute recess.

Judge: Then the court takes a short recess.

[Recess of the court.]

TESTIMONY OF MR. MARIO MERCADO-RIERA.

Attorney Ochoteco: Your name.

Mr. Mercado: Mario Mercado-Riera.

Attorney Ochoteco: Are you connected in any way with the firm Mario Mercado e Hijos?

Mr. Mercado: Yes, sir.

Q. What is your position in that firm? *A.* Managing director of it.

Q. Do you know Mrs. Elvira Olivieri-Commins? *A.* Yes, sir, I have known her for many years.

Q. By reason of what? *A.* Commercial and social relations.

Q. Are you acquainted with the contract of mortgage and

option to purchase and lease entered into between Mrs. Elvira Olivieri-Commins and the firm Mario Mercado e Hijos? *A.* Yes, sir.

Q. Do you know whether at any time prior, coincident with or subsequent to March 9, 1937, the firm Mario Mercado e Hijos was notified by registered mail or otherwise, by Mrs. Elvira Olivieri-Commins or by Mr. Rafael Barletta, or by anybody else, that said lady had received offers to purchase or lease the estates "Indios" and "Juanita", in connection with a third party?

Attorney Tormes: We object. Mrs. Elvira Olivieri was not bound to do so, simply because at the time referred to in that question Mario Mercado e Hijos did not hold any right by virtue of such option to purchase and lease, to which my colleague is referring in his question, simply because Mario Mercado e Hijos had disposed of the mortgage credit containing such clause of option to purchase and lease in favor of Mrs. Belen Gonzalez, widow of Tous Soto, without any reservation.

Attorney Sabater: We object on the same grounds, and because once Mario Mercado e Hijos assigned the mortgage credit to the widow of Tous Soto, said Mario Mercado e Hijos ceased to have any contractual relation with defendant Mrs. Elvira Olivieri-Commins. On this ground.

Judge: This is the same question that had come up previously.

Attorney Ochoteco: We submit it.

Judge: The court admits the question.

Attorney Tormes: We take exception.

Judge: What was the date, March 9 of which year?

Attorney Ochoteco: Nineteen hundred thirty-seven.

Mr. Mercado: The firm Mario Mercado e Hijos never received any notice, by either registered mail or in any other way, from Mrs. Elvira Olivieri Commins, advising us that she had received offers to purchase her property, or proposals to lease the same.

Q. And from Mr. Rafael Barletta? *A.* Neither.

Q. When did you happen, as managing director of the firm, to

be informed that Mrs. Elvira Olivieri-Commins had disposed by sale or by lease of the estates "Indios" and "Juanita"?

Attorney Tormes: That is immaterial and does not constitute any evidential element. We object.

Attorney Sabater: We object on the same grounds.

Judge: Question admitted.

Attorney Tormes: We take exception.

A. I was advised by the manager of the firm, Mr. Jose Ramon Peralta:

Attorney Ochoteco: What did you do on being advised by Mr. Peralta?

Mr. Mercado: I immediately directed him to go to Yauco and see attorney Lopez-de-Victoria, before whom, he had already told me, the deed had been executed.

Attorney Ochoteco: When did you receive that information from Mr. Peralta? Did you instruct Mr. Peralta to call at the office of attorney Lopez-de-Victoria, in Yauco? *A.* In Yauco.

Q. More or less, when was that? *A.* More or less, about the tenth or the eleventh.

Q. Of which month? *A.* March.

Q. Of which year? *A.* Nineteen hundred thirty-seven.

Q. Did you go together with Mr. Peralta? *A.* No, sir. Mr. Peralta left Guayanilla in his car straight for Yauco, and I left accompanied by attorney Pedro M. Porrata, who is present here. We called at the office of attorney Lopez-de-Victoria, who is present here.

Q. Who called there? *A.* Mr. Peralta, attorney Porrata and myself met there. We talked with attorney Luis Lopez-de-Victoria, and I remember having requested him to show us the deed, in order to ascertain the terms of the sale and lease entered into regarding the estates "Indios" and "Juantia", and attorney Lopez-de-Victoria refused to show us the deed on the ground that such papers were not public documents, that they were quasi-public (I think that was the word used by him) and that only the parties

in interest could read it. Attorney Lopez-de-Victoria told us that we had—

Attorney Tormes: Do not say what he told you.

Mr. Mercado: Will you let me explain?

Attorney Ochoteco: It is not admissible.

Judge: There are things that cannot be mentioned under the Law of Evidence, even though conversations may have taken place.

Attorney Ochoteco: Prior to the disposal by Mrs. Elvira Olivieri by sale or lease of said "Indios" and "Juanita" estates, did you know whether Mario Mercado e Hijos was in negotiations with said lady for the purchase or lease of such estates? *A.* Yes, sir.

Q. Were you in negotiations?

Mr. Mercado: We were in negotiations with Mr. Barletta, who had been authorized by Mrs. Elvira Olivieri-Commins to that effect.

Attorney Ochoteco: More or less, when did such negotiations begin? *A.* These conversations started between January first and January 6, 1937.

Q. How many years did they last? *A.* These negotiations were terminated when we went to the office of attorney Lopez-de-Victoria to defend our right of option and I told him—

Attorney Tormes: I move to strike out that reference to having an option.

Judge: That is his point of view. Whether or not he had it, will be determined by the court.

Attorney Tormes: It is in order to be consistent with the objection.

Judge: Motion denied.

Attorney Tormes: We take exception.

Attorney Sabater: We make the same objection and take the same exception.

Judge: You may proceed with your testimony.

Attorney Ochoteco: Just a minute. Did Mrs. Elvira Olivieri-

Commins make you definite proposals as to the sale and lease of these parcels?

Mr. Mercado: No, sir. Never.

Q. Did you make any to her? And when I say you, I have in mind the firm. *A.* Yes, sir.

Q. Testify in regard to these particulars. Do you need any memorandum for that purpose? *A.* Perhaps it would be better if I looked at the memorandum.

Attorney Tormes: We are going to fill the record with irrelevant matter, because Mr. Peralta testified in regard to all these questions. This is a repetition of the same thing. We are thereby wasting time.

Attorney Ochoteco: We might save time if my colleague accepts, with the proper objection the testimony of Mr. Mercado in the ejectment proceeding, and in this way we would save time.

Attorney Tormes: I can give you an answer within two minutes.

Attorney Ochoteco: With a further question we might close.

Attorney Tormes: There are things to which we must object.

Judge: Then he shall testify. Now he asks to be allowed to refresh his memory looking at certain papers.

Attorney Ochoteco: Who prepared that memorandum which you need to refresh your memory?

Mr. Mercado: We prepared it. I prepared mine.

Q. Yours? *A.* As I am not a typist, I used my secretary in its preparation.

Q. Was it you who made it? *A.* Yes, sir; I made a draft and I then dictated it.

Q. Please refresh your memory with your memorandum and answer my question. *A.* About January 4, 1937, there was a meeting in the office of the Central Rufina, attended by the manager Mr. Jose Ramon Peralta, Mr. Rafael Barletta, son-in-law of Mrs. Elvira Olivieri-Commins, and myself. Mr. Barletta requested from us or told us that Mrs. Elvira Olivieri-Commins had come to a decision, and that she wanted us to make a proposal to her through him. I told Mr. Barletta that we were not obliged

to make any proposals to her; that we were not obliged to make proposals to Mrs. Elvira Olivieri, in view of the fact that we had an option to purchase and lease on the same terms, and that it was up to Mrs. Elvira Olivieri to ask a price for her property.

Attorney Tormes: With the leave of the court. Please notice that at the time of that conversations with Mr. Rafael Barletta, the latter was an agent with limited powers from Mrs. Elvira Olivieri, and that all such conversations were subject to ratification and confirmation from her, as testified to by Mrs. Elvira Olivieri herself. On this score, we object, and pray for the elimination of such statement.

Judge: This question has already been raised when Peralta was testifying.

Attorney Tormes: Nobody had established the premise that they had an option. Peralta never went so far.

Judge: That is the only variation.

Attorney Tormes: It is a variation to our prejudice.

Judge: The court had stated that this is a point of view of the witness. It is not the witness who is going to decide this case; it is the court which is going to decide it. The witness might say that a certain thing is so, and the court may decide otherwise. So the court admits the testimony from the witness.

Attorney Tormes: We take exception.

Attorney Sabater: We object and take exception on the same grounds.

Judge: This question has been raised on several occasions and has been discussed at length in the course of this trial, and the court has already made up its mind regarding the admission of such evidence, and decides the testimony of the witness to be given any value that may be attached to it together with the rest of the evidence.

Attorney Sabater: We respectfully take exception.

Judge: Order reproduced.

Attorney Tormes: Let it be understood that on all occasions where testimony is given in this respect, we will object.

Judge: Please proceed.

Mr. Mercado: Notwithstanding such statements, we consented as a matter of courtesy to make a proposal to Mrs. Elvira Olivieri, reserving always our priority right, bearing in mind the competition from powerful competitors such as Guanica Central, and others. We made the proposal so as to open conversations with Mrs. Elvira Olivieri.

Attorney Ochoteco: And what kind of negotiations were these? *A.* Negotiations for purchasing.

Q. When was that, if you remember? *A.* About January 4, 1937.

Judge: For purchasing what? *A.* The estates of Mrs. Elvira Olivieri-Commins.

Attorney Ochoteco: Are you referring to "Indios" and "Juanita" estates? *A.* The "Indios" estate was first mentioned, but Mr. Barletta afterwards pointed out that the "Juanita" estate was also involved, all the lands.

Q. After the meeting of January 4, was there any other meeting?

Mr. Mercado: Yes, sir, at which I was present—

Attorney Ochoteco: Please mention all the meetings, according to their date, in which you were present. *A.* I was present at three meetings. One on January 4, in Guayanilla, that is the one I have just referred to; another on February 12, also in Guayanilla, in the office of Central Rufina, accompanied by the manager Mr. Peralta, and by Mr. Barletta; another with Mr. Barletta in my office in Ponce, about February 19, 1937. In the second meeting with Mr. Barletta, in Guayanilla, he told us that Mrs. Elvira Olivieri had decided to sell her estates and that she wanted to entertain offers of lease, and asked for proposals.

Attorney Ochoteco: And at the other meetings? *A.* At the last meeting in Ponce he called on me.

Q. In what place? *A.* In my office in Ponce, Luna Street. Mr. Barletta called on me and advised me that he had an engagement with Mr. Peralta, but that he was absent from the office on ac-

count of illness, and that he desired to exchange views with me. He submitted two proposals to me: one—and I do not know whether this is a personal matter—

Attorney Ochoteco: Do not mention it.

Mr. Mercado: He asked me to lend him—

Q. Please do not mention the personal matter. *A.* He stated that Mrs. Elvira Olivieri-Commins had made up her mind and that she was going to submit to us a final proposal in writing by registered mail.

Q. When was that? *A.* On February 19, 1937.

Q. Was this proposal which Mr. Barletta mentioned to you ever received by you or by the firm? *A.* No, sir.

Q. Verbally or in writing? *A.* No, sir.

Q. Was it mailed to you? *A.* No, sir.

Q. Please proceed with your testimony. *A.* After that, we went on talking. Small talk; then he got up, said goodby and went away.

Q. Was that the last time you met? *A.* That was the last time I had the pleasure of the visit of Mr. Barletta.

Attorney Ochoteco: Did you meet Mrs. Elvira Olivieri-Commins personally?

Mr. Mercado: Never. I never had the honor to call on her.

Q. Do you know— Do my colleagues acknowledge the qualifications of the witness as regards land and its value?

Attorney Tormes: He owns a lot of land.

Attorney Ochoteco: Is the witness personally acquainted with the estates "Juanita" and "Indios"? *A.* Yes, sir. I am personally acquainted with them.

Q. The portion belonging to Mrs. Elvira Olivieri-Commins? *A.* In what estate?

Q. Regarding "Indios". *A.* Yes, sir.

Q. And the "Juanita" estate? *A.* Yes, sir. I am personally acquainted with the parcel adjudicated to Mrs. Elvira Olivieri-Commins from the "Indios" estate, and the whole of the "Juanita" estate.

Attorney Ochoteco: When you say "Indios", do you refer to the portion sold by Mrs. Elvira Olivieri-Commins to Messrs. Lluberas?

Mr. Mercado: Yes, sir. I refer to the parcel known as "Cupey", and the one known as "El Uno Bomba".

Judge: What? *A.* The parcel adjudicated to her was the "Cupey" tract, with an area of 41 cuerdas, and part of the parcel "Bomba", of 4 cuerdas; totalling 45 cuerdas.

Attorney Ochoteco: Which of the two estates is more valuable, the "Indios" or "Cupey" tract, or the "Juanita" tract? *A.* "Juanita" is worth twice as much as the portion called "Cupey" in the "Indios" estate.

Q. On what do you rely for such a statement? *A.* The land of the "Cupey" parcel is very good land, but has half as much in cane land as the "Juanita" estate whose alluvial soil is better than the land of the "Cupey" parcel. The "Juanita" estate has 81 cuerdas planted to cane, and the "Cupey" parcel has 45.

Attorney Ochoteco: Forty-five?

Mr. Mercado: Yes, sir.

Q. Please tell me, subsequent to the assignment of the four mortgage promissory notes by the firm Mario Mercado e Hijos to the heirs of Mr. Jose Tous-Soto, what further intervention did you have, or share, or what steps did the firm of Mario Mercado e Hijos take in connection with such mortgage credits?

Attorney Tormes: We object on the following ground: because the answer to such a question would tend to change the terms of a written agreement; the agreement entered into between this people and the Tous-Soto people, for which contract there was an authorization from this court, because there were incapacitated minors involved in this deal, and this court was never advised of any reservation in favor of Mario Mercado e Hijos, when disposing of such mortgage promissory notes and of the mortgage securing such promissory notes. Because it is presumed that all the stipulations between the parties were set down in that written instrument, and they are now estopped, Mario Mercado e Hijos,

from alleging anything in regard to such deal. Because no fraud in that deal has been alleged, nor any defect, and based on said points of view we object to the admission of such evidence. This is the proper objection for the present, and we further object on the ground that any reservation that might have been made, as real property is involved, is a right recordable in the Registry of Property, and if there had been any reservation in favor of Mario Mercado e Hijos, and the same had been recorded in the Registry of Property in connection with this estate, the same cannot prejudice either Lluberas or Blasini.

Attorney Sabater: The same objection.

Attorney Ochoteco: It is not the question here of altering the terms of any contract. We are specifically referring to the assignment of the mortgage promissory notes made by Mario Mercado e Hijos to the widow of Tous-Soto. When the court shall have an opportunity to study the case, and now it can do so, the court will have an opportunity to examine the deed of assignment of the mortgage credit, of the four mortgage promissory notes, executed by the partnership Mario Mercado e Hijos to the widow of Tous-Soto.

[Attorney Ochoteco argues thereon and cites 47 P.R.R. 522.]

[Attorney Tormes argues on his objection at length.]

Judge: This point has already been discussed at length. The court decides that he may testify.

Attorney Tormes: We take exception.

Attorney Sabater: We take exception.

Judge: Please proceed.

Attorney Ochoteco: Let the stenographer repeat the question.

Stenographer [reading from his notes]:

"*Q.* Please tell me, subsequent to the assignment of the four mortgage promissory notes by the firm Mario Mercado e Hijos to the Heirs of Mr. Jose Tous-Soto, what further intervention did you have, or share, or what steps did the

firm of Mario Mercado e Hijos take in connection with such mortgage credits?"

Mr. Mercado: The firm Mario Mercado e Hijos went on performing all the undertakings of the deed.

Attorney Ochoteco: Are you referring to the deed of assignment to the widow of Tous-Soto?

Mr. Mercado: Yes, sir.

Attorney Tormes: Let the fact be stated that the witness is reading from some papers before him. *A.* These are some memoranda which I have before me.

Attorney Ochoteco: Any objection?

Judge: He may testify in general terms.

A. To pay the interest to the widow monthly.

Attorney Ochoteco: Did Mario Mercado e Hijos pay punctually the interest to the widow and the heirs of Mr. Jose Tous-Soto? *A.* Yes, sir. We used to pay the interest monthly, whereas Mrs. Elvira Olivieri credited the same to use semiannually.

Q. And how did you such interest to the heirs of Tous-Soto? *A.* Monthly, so as to make it easy for the widow to get her income.

Q. That is all.

Attorney Tormes: We will move to strike out the testimony, and in order to be consistent with our objection—

Attorney Ochoteco: Will you allow me a question?

Attorney Tormes: As irrelevant. We move to strike out all the particulars stated by the witness in regard to the reservation.

Attorney Sabater: We also move to strike that out.

Attorney Ochoteco: We object.

Judge: Motion to strike overruled.

Attorney Tormes: We respectfully take exception.

Attorney Sabater: We take exception.

Attorney Ochoteco: One question. [To the witness.] Please tell me, did ever the partnership Mario Mercado e Hijos assign to the heirs of Mr. Jose Tous-Soto the option to lease and purchase mentioned by you in your testimony, granted by Mrs. Elvira

Olivieri-Commins to the firm of Mario Mercado e Hijos in connection with the estates "Indios" and "Juanita"?

Attorney Tormes: We strongly object because the same is a leading question.

Judge: There is a deed of assignment of credits, and the deed will speak for itself. Objection sustained.

Attorney Ochoteco: All right, that is all with the witness.

Judge: Is the witness going to be cross-examined at length?

Attorney Tormes: Has my colleague finished with the witness?

Attorney Ochoteco: That is all for the present.

Judge: Then the court adjourns to this afternoon for the cross-examination. The court adjourns to 2 P.M.

[Recess of the court.]

Judge: The session of the court is resumed. Let us proceed with the case. Mario Mercado-Riera was on the stand. The cross-examination of the witness was about to begin.

Attorney Tormes: We are not going to cross-examine in behalf of the defendants. We put no questions to Mr. Mario Mercado. We confine ourselves solely to the motion to strike out and we rest thereon.

Judge: That has been disposed of. Go to your seat.

Attorney Subater: We will not cross-examine.

Attorney Ochoteco: Let us gain time by examining attorney Zapater in Blasini's absence.

TESTIMONY OF ATTORNEY FERNANDO ZAPATER-MARTINEZ.

Attorney Ochoteco: Your name.

Mr. Zapater: Fernando Zapater-Martinez.

Q. Profession? *A.* Attorney at law.

Q. Do you know Mr. Jose R. Peralta? *A.* Yes, sir.

Q. Do you know Mr. Rafael Barletta? *A.* Yes, sir. I know him.

Attorney Ochoteco: Do you remember about March 8, 1937, having seen Mr. Peralta and Mr. Barletta together?

Mr. Zapater: Yes, sir.

Q. Where? *A.* In my office, in the house of Dr. Salazar, corner of Isabel and Mayor Streets, in Ponce.

Q. Did you overhear any conversation between them? Between Mr. Barletta and Mr. Peralta? *A.* They called there—.

Q. I mean whether you overheard any conversation between Mr. Barletta and Mr. Peralta. *A.* Yes, sir.

Q. What did they talk about? *A.* Mr. Peralta addressed himself to Mr. Lluberas, to Mr. Barletta—

Judge: Then you mean Barletta, instead of Lluberas? *A.* Yes, sir.

Judge: I want to make this clear for the purpose of the record. *A.* Mr. Peralta asked Mr. Barletta where the matter stood, and he said to him that he would call on the office of Mr. Peralta to have an exchange of views.

Attorney Ochoteco: Did you overhear any other statement from Mr. Peralta?

Attorney Tormes: We object, as being too generic.

Attorney Ochoteco: We withdraw the question.

Mr. Zapater: He said that the business was progressing all right.

Attorney Tormes: The question has been withdrawn.

Attorney Ochoteco: Please mention all that you overheard at that moment between Barletta and Peralta.

Attorney Tormes: In connection with what?

Attorney Ochoteco: In connection with the conversation to which the witness has been referring.

Attorney Tormes: It has been stated here that he told him that he would call at his office, and it seems to me that he did not go further.

Attorney Ochoteco: The question has been taken down. Let the stenographer read the question. Stenographer [reading from his notes]:

"Did you overhear any other statement from Mr. Peralta?"

Attorney Tormes: A limited power is involved here and may be

that he will talk of things that have nothing to do with the present case; things quite unnecessary.

Judge: The witness is an attorney and he ought to know the matter to which he must confine himself and testify in regard to what he may consider pertinent.

Mr. Zapater: I cannot state precisely the words. This happened long ago. It seems to me that it was two years ago, and I do not remember the exact words.

Attorney Ochoteco: The ideas. *A.* I remember that Mr. Peralta said to him something about some pending business in connection with certain estates in Guayanilla, belonging to Mrs. Elvira Olivieri-Commins, and that Mr. Barletta told him that the matter was progressing all right; that he would later on call at the office of Mr. Peralta, and they went on talking regarding that matter.

Q. That is all.

Judge: Anything further?

Attorney Ochoteco: That is all.

Judge: The other party?

Attorney Tormes: Mr. Zapater, please tell me. On that March 8, 1937, you said that Mr. Lluberas had been in your office?

Mr. Zapater: Yes, sir.

X-Q. Was the mortgage for $40,000 owed by Mrs. Elvira Olivieri-Commins to the widow of Tous-Soto, cancelled on that same day? *A.* Yes, sir.

X-Q. For how long before had you been taking part in the proceedings for the cancellation? *A.* If I am allowed to look at my memorandum that I have here; some notes from my desk.

X-Q. For how long before had you been engaged in the cancellation? *A.* If I am allowed to look at my notebook, I can specify the dates. [The witness examines a notebook in his hands.] On March 3, 1937, there called at my office mister—

Judge: Examine your notes to refresh your memory and answer the questions.

Mr. Zapater: Yes, this happened on the eighth; five days before.

Judge: Specify the date of the cancellation of the mortgage, and how long you had been working. *A.* For five days before.

Q. And when did that conversation take place? *A.* The conversation between Mr. Barletta and Mr. Peralta, on the eighth; and the time when I commenced to do something in connection with this matter, was March 3, that is, five days before.

Attorney Tormes: In connection with that something that you were going to do? *A.* Mr. Lluberas called with Mr. Barletta, to give me instructions to proceed with the judicial steps necessary for the cancellation—

Attorney Ochoteco: We object to the question and the answer, because we have not asked him about Mr. Lluberas. We have only asked him about Mr. Barletta, and we fail to see that that is pertinent because they are going into a matter not covered by the direct examination.

Judge: Whom do you refer, Mr. Barletta or Mr. Lluberas?

Attorney Tormes: In his testimony he said that Mr. Lluberas had been there.

Judge: Was Mr. Lluberas there? Had he been there?

Mr. Zapater: He called on the third and later on on the eighth.

Q. Was he there the day of the meeting? *A.* Yes, sir, but he had gone downstairs from the office.

Attorney Tormes: Now you will see the connection with the presence of Mr. Lluberas in the office of Mr. Zapater on the eighth. The court must know that.

Attorney Ochoteco: We have confined ourselves to the examination of Mr. Barletta.

Atorney Tormes: The witness has stated that the other had been there.

Attorney Ochoteco: We have confined ourselves exclusively to the examination of the witness as regards Mr. Barletta, and the witness says that Mr. Barletta had a conversation with Mr. Peralta, and that such conversation took place or commenced

when Mr. Lluberas had gone downstairs to take his car, or something like that. Now I ask: what is the relevancy of a cross-examination in connection with the reason that drove Mr. Lluberas to the office of Mr. Zapater, inasmuch as no question has been put in the direct examination in connection with Mr. Lluberas? If my colleague wants such evidence, he can call the witness to the stand for the defendants at the proper time.

Attorney Tormes [To the court]: Please notice—

Judge: The court thinks it is admissible, inasmuch as the interview between Barletta and Peralta took place when Mr. Lluberas was going downstairs. Question admitted.

Attorney Ochoteco: We take exception.

Judge: Let the stenographer repeat the question.

Stenographer [reading from his notes]:

"Specify the date of the cancellation of the mortgage, and how long you had been working. *A.* For five days before.

"*Q.* And when did that conversation take place? *A.* The conversation between Mr. Barletta and Mr. Peralta, on the eighth; and the time when I commenced to do something in connection with this matter, was March 3, that is, five days before.

"Attorney Tormes: In connection with that something that you were going to do."

Judge: You may answer the question.

Mr. Zapater: When cancelling the mortgage credit constituted in favor of Mario Mercado e Hijos.

Judge: When was it that he called to give you instructions? Who gave you the instructions? *A.* Mr. Barletta and Mr. Lluberas.

Q. Both? *A.* Yes, sir.

Attorney Tormes: On that March 8, 1937, were you the attorney— *A.* Yes, sir.

X-Q. Retained by Mario Mercado e Hijos? *A.* Yes, sir.

X-Q. Were you the attorney of Mrs. Belen Gonzalez, widow of

Tous-Soto? *A.* Yes, sir. She was the owner of this mortgage credit.

X-Q. What is this document I show you? *A.* A verified copy of a deed.

Attorney Tormes: Regarding what?

Mr. Zapater: Cancellation of mortgage.

Judge: Was it already submitted in evidence?

Attorney Tormes: It is an exhibit of the plaintiff; the cancellation. A deed executed before attorney Zapater. Number 17 of March 8, 1937.

Clerk: Exhibit I of the plaintiff.

Attorney Tormes: Did you draw up that deed? *A.* Yes, sir.

X-Q. And you, under your signature, state on page—

Attorney Ochoteco: I object. The witness is not testifying as an attorney, but as a witness, and anything appearing from the instrument can be weighed by the court: whether it was an assignment of a mortgage credit or of an option, or of promissory notes, but it cannot be expected that the witness, juridically speaking, should ascertain for the court whether the subject matter of the assignment was a mortgage or a promissory note. The exhibit speaks for itself.

Attorney Tormes: It is what attorney Zapater, in his capacity as notary, set down on this deed.

Judge: He can testify as to facts.

Attorney Tormes: Whether he knows it and set down on this deed that Mrs. Belen was the owner— Let us save time. Attorney Zapater, as far as I am concerned, is excused as a witness.

Attorney Ochoteco: Do not you want to put further questions to him?

Attorney Tormes: No; I realize what an embarrassing situation is.

Judge: There is not a jury present here.

Attorney Ochoteco: At this time, and for the purpose of the record, we should like to have witness Mr. Rafael Barletta summoned (we have been taking steps for several days to locate him),

and that the marshal advise the court whether or not he has appeared.

Judge: Let the marshal call aloud the witness in the corridor; Mr. Rafael Barletta.

Attorney Tormes: There is an order of the court directing that this witness be summoned.

Judge: Perhaps he may have been here, and that is why I have ordered to have him called out.

Marshal: I have called but there has been no answer.

Judge: What does the plaintiff want now? The marshal says that Mr. Barletta does not answer. He is not within the precincts of the court.

Marshal: I do not know him personally; I have called him but no answer.

Attorney Ochoteco: We want this to be recorded, for the purpose of the record.

Judge: Has he been called in the same way as the other witnesses, and has he not answered?

Marshal: No, sir.

Attorney Ochoteco: We want to know whether every step has been taken by the marshal of this court in order to summon Mr. Barletta as a witness.

Judge: He has been called several times.

Clerk: Here is the summons addressed to Mr. Rafael Barletta, domiciled in Mayaguez, dated November 7, 1939. This summons was returned and the following appears on its back: "Every conceivable step has been taken to locate Mr. Rafael Barletta in order to serve on him the above summons, but our efforts have been of no avail, and I have been told by his people that he is out on the Island. (Signed) R. Forestier, Deputy Marshal."

Judge: Is that the return from the Marshal of Mayaguez?

Marshal: Yes, sir.

Judge: Did you receive that?

Marshal: Yes, sir. By mail.

Judge: When did you receive that?

Marshal: Monday afternoon.

Judge: Monday afternoon?

Marshal: Yes, sir.

Judge: What further information does the plaintiff desire?

Attorney Ochoteco: We wanted only to have the statement of the marshal recorded.

Judge: Some other evidence?

Attorney Ochoteco: Mr. Blasini.

TESTIMONY OF MR. EMILIO NOEL BLASINI-TOTTI.

Attorney Ochoteco: Your name?

Mr. Blasini: Emilio Noel Blasini-Totti.

Q. Are you one of the defendants in the present case? *A.* I think so.

Q. What do you mean? *A.* I am represented by an attorney in this court and I think I am one of the defendants.

Q. Do you know Mrs. Elvira Olivieri-Commins? *A.* Yes, sir.

Q. How long have you known her? *A.* She has known me longer than I have known her.

Attorney Ochoteco: I am interested in your knowledge of her.

Mr. Blasini: As long as I remember; she is my aunt.

Judge: What is your age? *A.* Thirty-three years, and some months, I think.

Attorney Ochoteco: Do you remember her as far back when you were about five years old? *A.* Ever since I reached the age of discretion; that depends.

Q. Do you know the estate "Juanita"? *A.* Yes, sir.

Q. Have you entered into any agreement with Mrs. Elvira Olivieri-Commins, in connection with the "Juanita" estate? *A.* I entered into a contract of lease, as shown by a deed that was submitted in evidence.

Q. This contract of lease entered into between you and Mrs. Elvira Olivieri-Commins, when was it executed?

Attorney Tormes: The best evidence is the contract, and if my colleague does not have a copy of it, I will let him have mine.

Attorney Ochoteco: No, my colleague, I thank you.

Attorney Tormes: We object; if the contract is in writing, that is the best evidence.

Attorney Ochoteco: One thing is the content of the contract and another thing is the date. I am asking him to let us know the date.

Judge: The question admitted, if he knows it.

Attorney Ochoteco: When was it?

Mr. Blasini: As I do not have any memoranda just now; the deed bears the date of its execution.

Q. You may refresh your memory by the deed, which is before you. Will the witness refresh his memory? *A.* It was in March, 1937, if I am not mistaken.

Attorney Tormes: I place the deed at the disposal of my colleague.

Attorney Ochoteco: Have you in your possession, or your attorney in his possession, any paper that might refresh your memory as to the date of the execution of the contract?

Mr. Blasini: The copy.

Mr. Ochoteco: Please examine it.

Attorney Tormes: I let my colleague to [*sic*] have it; deed number 41, of March 9, 1937.

Attorney Ochoteco: I ask the witness, and I am much obliged to you for your willingness. *A.* March 9, 1937.

Judge: March 9, 1937? *A.* Yes, sir.

Judge: Please proceed.

Attorney Ochoteco: Can the witness tell us the time when he discussed with Mrs. Elvira Olivieri-Commins that contract of lease? *A.* I discussed the terms of such contract of lease the night before the execution of the deed.

Q. The night before the execution of the deed? *A.* Yes, sir, that is, March 8, 1937.

Q. March 8, 1937?

Mr. Blasini: Yes, sir.

Attorney Ochoteco: Was that the first time that you discussed the contract of lease with her? *A.* Yes, sir.

Q. Prior to that time, had you discussed any contract of lease with her? *A.* No, sir.

Q. Never? *A.* No, sir.

Q. Nor had she suggested to you to lease the estate to you? Pay attention to the question. *A.* No.

Q. Not what? *A.* Your question is in the negative.

Q. Let the stenographer repeat the question.

Stenographer [reading from his notes]:

"*Q.* Nor had she suggested to you to lease the estate to you? Pay attention to the question."

A. No.

Q. Between you and her, had there been no conversations regarding the lease of that estate until the night before the day when the deed was signed? *A.* Conversations about a lease?

Q. Yes, sir. *A.* What do you mean?

Q. Let the stenographer read the question.

Stenographer [reading from his notes]:

"*Q.* Between you and her, had there been no conversations regarding the lease of that estate until the night before the day when the deed was signed?"

Mr. Blasini: No.

Attorney Ochoteco: No conversations? *A.* No.

Q. Nor any conversation in connection with the "Juanita" estate, or the "Indios" estate? *A.* Well—

Q. Well, what? *A.* I do not understand your question. I cannot answer as you wish. Pardon me, but if—

Q. I put the question to you and you answer it to me. *A.* I had hopes to lease the "Juanita" estate, and that is all.

Q. My question has not been answered yet. We have gone as far as the hopes. The question is without answer. You have not answered my question. *A.* I am referring to the previous answer.

Q. Meaning what? *A.* It is nothing to be wondered at that I should have expressed my legitimate hopes.

Attorney Ochoteco: I am referring to Mrs. Elvira Olivieri and to yourself.

Mr. Blasini: Maybe I had expressed to her in person—

Q. Did you ever discuss any contract of lease? *A.* I can tell you now that I did not.

Q. You say that it was on that night that you discussed for the first time the contract of lease with her? *A.* Yes, sir.

Q. Did she send for you? *A.* She did not.

Q. And why did you happen to meet? *A.* I went to Mayaguez.

Q. Why did you go to Mayaguez? What made you to undertake the trip to Mayaguez? *A.* My legitimate hope of leasing the "Juanita" estate.

Q. And it was on that night that you made up your mind to go to Mayaguez for the first time and talk with her about a specific lease, a thing that you had not done before? *A.* Yes, sir.

Q. Were you driven by any special circumstance to make up your mind to go that night to Mayaguez? *A.* A very special one.

Attorney Ochoteco: Which is that?

Mr. Blasini: The cancellation of the promissory notes which I carried with me, and which have been submitted in evidence.

Q. Then, these promissory notes had been delivered to you that night? *A.* Yes, sir. That afternoon.

Q. By whom? *A.* By my brother-in-law.

Q. His name? *A.* Manuel Francisco Lluberas-Pasarell.

Q. Why did your brother-in-law deliver to you these promissory notes? *A.* He—

Q. For what purpose did he deliver to you these promissory notes? What for? *A.* He delivered to me the promissory notes because he came home—

Q. For what purpose, is the question?

Judge: To do what?

Attorney Ochoteco: In order to be short—

Judge: What was the purpose?

Mr. Blasini: I took them to Mrs. Elvira Olivieri.

Attorney Ochoteco: Now you understand. In order to be taken to Mrs. Elvira Olivieri. *A.* Yes, sir.

Q. And about what time did your brother-in-law Lluberas arrive? *A.* In the afternoon.

Q. What time? *A.* I do not remember exactly.

Q. More or less? *A.* I never carry a watch. Maybe it was 3, 4, 5, or 6.

Q. Do not you remember the hour exactly? *A.* I do not.

Q. And he delivered to you those promissory notes in order to be taken to Mrs. Elvira Olivieri? *A.* He delivered them to me and I took them to her.

Q. To be delivered to her, yes or no? *A.* Chito delivered the instruments to me because I was going to Mayaguez.

Q. Because you were going to Mayaguez? *A.* Yes, sir.

Attorney Ochoteco: Then you had made up your mind to go or make the trip to Mayaguez before Don Chito had delivered the promissory notes to you?

Mr. Blasini: No.

Q. And when did you make up your mind to go to Mayaguez? *A.* Upon his calling at my house.

Q. Why did you make up your mind to make the trip? *A.* Because he told me that he had cancelled the mortgage credit, originally held by Mario Mercado e Hijos, and then assigned to the heirs and the widow of Tous-Soto, and that the widow of Tous-Soto had been paid $40,000; the 40,000 and odd dollars owed by my aunt Elvira to the widow of Tous-Soto.

Q. Did Don Chito tell you that? *A.* Yes, sir.

Q. And then, upon Don Chito telling you that, what did you do? *A.* Then—

Q. Then did he say to you: "Take these promissory notes to Mrs. Elvira Olivieri?" *A.* He told me as follows: He told me that Mrs. Elvira Olivieri, as soon as these mortgage promissory notes were cancelled, would be released of any obligation to the widow of Tous-Soto.

Attorney Ochoteco: Who had told you that Mrs. Elvira Oliv-

ieri-Commins would be free as soon as the notes were cancelled, to lease the estate? Who had told you that? *A.* There is a deed, if my memory does not fail me, which contains the assignment by Mario Mercado e Hijos to the widow of Tous Soto, submitted in evidence—

Q. Answer the question. *A.* The deed; that is where I got my information.

Q. Then, you mean to say that you had been informed before Don Chito had delivered to you the four promissory notes? How was it that you had knowledge of the existence of a deed between the parties? *A.* There was a mortgage deed with an option, an option to lease and purchase.

Q. Regarding which estate? *A.* In favor of Mario Mercado e Hijos, and another—

Q. Regarding which estate? *A.* And a subsequent one whereby Mario Mercado e Hijos assigned such mortgage credit to Mrs. Belen, widow of Tous Soto.

Q. Reg rding which estate?

Mr. Blasini: The "Juanita" estate and the "Indios" estate.

Attorney Ochoteco: How long had you known of the existence of the deed referred to by you, prior to the day or the afternoon when Mr. Chito Lluberas went to see you? *A.* Do you want to know whether I knew it before?

Q. Do you want the stenographic notes read out to you?

Stenographer [reading from his notes]:

> "How long had you known of the existence of the deed referred to by you, prior to the day or the afternoon when Mr. Chito Lluberas went to see you?"

A. Prior to Chito's coming to see me?

Q. More or less, how long before; a month, two months, a week, can you remember? *A.* I had known it for a long time; for more than two or three months.

Q. Who had told you about this deed? *A.* Mrs. Elvira Olivieri herself had told me. She is my aunt.

Q. Then Don Chito told you, if I am not wrong, that as Mrs. Elvira Olivieri had cancelled the mortgage upon her estates held by the widow of Tous-Soto, he had the promissory notes; did he deliver to you the four notes or obligations?

Mr. Blasini: He had the four promissory notes cancelled.

Q. In connection with this mortgage? *A.* Yes, sir.

Q. Whereupon it occurred to you to go to Mayaguez? *A.* Yes, sir.

Q. Because you knew that once this mortgage had been cancelled, as Mrs. Elvira Olivieri personally had told you, you could lease or buy those estates? *A.* Mrs. Elvira Olivieri never told me that I might purchase or lease from her after the cancellation. It is you who says so.

Q. If my memory does not fail me, a moment ago you said that Mrs. Elvira Olivieri had told you about this right of option to purchase and lease existing in connection with her estates. Did you say that? *A.* I appeal to the record.

Q. No objection to the stenographer reading the question to him.

Stenographer [reading from his notes]:

> "*Q.* If my memory does not fail me, a moment ago you said that Mrs. Elvira Olivieri had told you about this right of option to purchase and lease existing in connection with her estates. Did you say that?"

Attorney Ochoteco: Had you said that?

Mr. Blasini: I never said that Mrs. Elvira Olivieri might do so—

Q. You did not say that?

Attorney Tormes: What the record says.

Judge: I have before me a memorandum of his testimony, where he states that he knew that this deed existed; the mortgage credit in favor of Mario Mercado e Hijos, and then the assignment of the credit to the widow of Tous-Soto, and that he knew it because Mrs. Elvira Olivieri had told him three or four months before the assignment.

Attorney Ochoteco: What had Mrs. Elvira Olivieri-Commins told you? *A.* She had mentioned the deed.

Q. And the option? *A.* She showed me the deed.

Q. Did you see it, did you read it? *A.* Yes, sir.

Attorney Ochoteco: To the witness, then you, as soon as you were informed that the mortgage of the widow of Tous-Soto had been cancelled, you immediately decided to go to Mayaguez?

Mr. Blasini: I went to Mayaguez; I made up my mind instantly.

Q. To go to Mayaguez because Mrs. Elvira Olivieri was free? *A.* If you put it that way—

Q. Was it then that Don Chito told you: "Since you go to Mayaguez, take the promissory notes to her"? *A.* I told him that I was going to Mayaguez, since he informed me that the promissory notes had been paid.

Q. Did you tell Don Chito the purpose of your trip? *A.* I told him that I was going to have a talk with Mrs. Elvira Olivieri.

Q. In connection with what? *A.* He did not ask me.

Q. What is Don Chito to you? *A.* He is my brother-in-law.

Attorney Ochoteco: At that time, were you on friendly terms? Were Don Chito and you on friendly terms as friends and relatives?

Mr. Blasini: Familiarly.

Q. Did you then tell Don Chito that you were going to Mayaguez, when Don Chito told you of the cancellation of the mortgage deed? *A.* Yes, sir.

Q. Did Don Chito either ask you or did you tell Don Chito, the purpose of your going to Mayaguez? *A.* He did not ask me.

Q. And did you tell him? *A.* No, sir.

Q. Then, did he tell you to take the promissory notes? *A.* Yes, sir.

Q. Was that so? *A.* Yes, sir.

Q. And you left immediately for Mayaguez? *A.* Yes, sir.

Q. And you arrived at the home of Mrs. Elvira Olivieri? *A.* Yes, sir.

Q. And did you speak to her of the business?

Mr. Blasini: I greeted her first; we talked.

Attorney Ochoteco: But the purpose you had in mind; the purpose of your trip was the business of the lease of the estate? *A.* That is a matter of interpretation.

Q. I put the question to you and you answer it to me. *A.* The purpose was to greet my aunt, my cousins and other relatives.

Q. Where did you see Don Chito, and this conversation with Don Chito, was it in Ponce? *A.* Yes, sir.

Q. Then, what led you to go to Mayaguez was to greet your aunt, your cousins, etc.? *A.* To congratulate her and at the same time—

Q. Was not your purpose in connection with the lease? *A.* That might also be.

Q. What led you to go to Mayaguez? *A.* My aunt was worrying a lot about a lien which prevented her from selling or leasing without granting priority to the creditors. In this case it was a matter of interpretation. She wanted to be released and she hoped to pay the widow of Tous-Soto and be released from the option clause.

Attorney Ochoteco: Why did you know that she entertained those hopes to be released?

Mr. Blasini: Because she, in confidential talks, had told me: "If I could get the money to pay the widow of Tous-Soto—"

Q. Please proceed with your testimony. Then what led you to go to Mayaguez was to congratulate your aunt on her having paid the mortgage? *A.* Yes, sir, and to realize my legitimate ambition.

Q. What was that ambition? *A.* To lease from her the "Juanita" estate.

Q. And then you arrived there, greeted the family and talked business on that night? *A.* Yes, sir.

Q. Did you reach an agreement with her? *A.* We came to an agreement which was carried out on the following day.

Q. Then was it carried out on the following day? *A.* Yes, sir.

Q. Did not you know at the time (I am referring to the con-

gratulation) that Mrs. Elvira Olivieri-Commins for some days previously had already in her possession the money to pay the mortgage? *A.* Yes, sir.

Attorney Ochoteco: Who was keeping that money?

Mr. Blasini: My brother-in-law Chito, that is, Manuel Francisco Lluberas.

Judge: It is understood that he is Manuel Francisco Lluberas.

Attorney Ochoteco: Did you know that already? *A.* Yes, sir.

Q. That on that day she had already money to pay? *A.* Yes, sir.

Q. Who had told you that? *A.* Chito had told me.

Q. Had he told you? *A.* Yes, sir.

Q. You, of course, did not want to talk to her about that until the mortgage was cancelled, although she had the money already? *A.* Yes, sir.

Q. What made you not to talk to her until the mortgage was cancelled, notwithstanding the fact that Mr. Lluberas had the money in his possession?

Mr. Blasini: So long as a mortgage is not cancelled, you have no right to talk of any other business, as she had said.

Attorney Ochoteco: Did she have; did she have practically the money in her hands; in Senor Chito's hands? *A.* She had not paid.

Q. What prevented you from talking to her; what made you think that you had to wait for the mortgage to be cancelled? *A.* I knew that she was waiting and I did not go. Afterwards, when I knew that she was free, I went.

Q. Did you go next day to finally execute the contract? *A.* Yes, sir.

Q. And to sign the deed? *A.* Yes, sir.

Q. The day following the conversation with Mrs. Elvira Olivieri-Commins? *A.* On the ninth.

Q. What time did you return from Mayaguez that night? *A.* Which night?

Q. The night you talked with Mrs. Elvira Olivieri.

Mr. Blasini: Do you refer to the eighth? Why did not you tell me? I returned between eleven and twelve midnight.

Attorney Ochoteco: Then you went back to Mayaguez on the following day? *A.* Yes, sir. I told my attorney in that case, who is my attorney in the present case, that is, attorney Luis Lopez-de-Victoria, on the morning of the ninth I said to him: "Luis, I have a business in hand, draw up the deed in this and in that way and let us go to Mayaguez to have the deed signed."

Q. Did you come straight from Mayaguez? *A.* On that night, yes; I left Mayaguez and arrived at Yauco.

Q. On reaching Yauco, what did you do? *A.* I slept in Yauco.

Q. Not here in Ponce? *A.* No, sir.

Q. In Yauco? *A.* Yes, sir.

Q. Did Mrs. Elvira Olivieri sell on that day to Don Chito also? *A.* No.

Q. Was it not on that day? *A.* No.

Attorney Ochoteco: Not what?

Mr. Blasini: That she did not sell on that day.

Q. How do you know it? *A.* Because I know it; because it was I who brought the proposals from Mayaguez in case Chito and the sisters wanted to buy.

Q. Then that was some other day? *A.* Will you allow me to explain?

Q. Had you and she agreed on the ninth; I refer to the ninth, were the deed of lease and sale agreed upon and signed? *A.* Yes, of course.

Q. On that same day? *A.* On the ninth.

Q. And where were they signed? *A.* In Mayaguez.

Judge: Please proceed.

Attorney Ochoteco: At what time were they signed? *A.* In the afternoon.

Q. More or less? *A.* May be at 3, 4, 5, or 6. I am very stupid at guessing the hour. I can never get home for lunch exactly on time.

Attorney Ochoteco: What did Mrs. Elvira Olivieri tell you; what message did she send with you to Don Chito?

Mr. Blasini: We talked about what she had in mind. We started by making many estimates and then we reached an agreement.

Q. I am eager to have an answer to my question. May the stenographer be kind enough to read out the last question.

Stenographer [reading from his notes]:

"What did Mrs. Elvira Olivieri tell you; what message did she send with you to Don Chito?"

A. To find out whether Chito wanted to buy.

Attorney Ochoteco: That is the question. Then did Mrs. Elvira Olivieri send with you the message to Don Chito to see whether he wanted to buy? *A.* Yes.

Q. To purchase what? *A.* The estate "Indios", because the other was under a lease. She had verbally promised to lease it.

Q. On that night? *A.* Yes, sir. Verbally.

Q. Did she send any other message to him? *A.* She told me to tell him—

Attorney Ochoteco: Tell us all she told you to tell him.

Mr. Blasini: When talking about the lease and having reached an agreement—

Q. Just a moment. Please tell me everything that Mrs. Elvira Olivieri told you to tell Don Chito.

Judge: You have already told some part. Tell him now the rest.

A. Mrs. Elvira Olivieri gave me a proposal to be submitted to Chito.

Attorney Ochoteco: That is just what I desire to know. *A.* Of course, I tried to ascertain from her.

Q. What do you mean by "ascertain"? *A.* I could not tell you the exact meaning.

Q. What? *A.* As I did not know, more or less, how she was; talking with her I could ascertain more or less where she stood.

Q. Was she your aunt? *A.* Yes, sir. She told me to take the proposal to Chito; that she did not care; that he could bring the deed drawn up; that $1,000 more or less did not matter; that she did not mind because what she wanted—that she had figured and that it was to her advantage to sell the property rather than going on paying interest.

Attorney Ochoteco: I am still waiting for your statement in regard to the proposal.

Mr. Blasini: I had forgotten it. $45,000.

Judge: What do you mean? *A.* $45,000; that she offered to sell him the "Indios" estate for $45,000. Then, there fits in the little word I used. I began to inquire and she told me that $1,000 more or less would not matter.

Attorney Ochoteco: Did you leave Mayaguez with the proposal for Don Chito of the $45,000? *A.* $45,000, and that $1,000 or $1,500 difference would not matter.

Q. Proceed with your testimony. *A.* I then told him.

Judge: Then, you told him? *A.* I reached Yauco—

Attorney Ochoteco: At what time did you reach Yauco?

Mr. Blasini: 11:30, 12 or 12:30.

Attorney Ochoteco: At night? *A.* Yes, sir. More or less.

Q. When you spoke to Don Chito about that, had Don Chito already gone to bed? *A.* I think he was reading.

Q. And did you at that hour inform him as regards the proposal from Mrs. Elvira Olivieri of $45,000? *A.* Yes, sir.

Q. And did he accept? *A.* No.

Q. Did not he say anything? *A.* He said: "Well, it is all right." Then we talked further and figured somewhat.

Q. And did you go to bed? *A.* He went to bed and I left.

Q. Where did you go? *A.* To my father's home.

Q. In Yauco also? *A.* Yes, sir.

Q. What happened next day? *A.* Well, I called at the office of attorney Luis Lopez-de-Victoria and there I told him: "Luis, I have this business on hand."

Attorney Ochoteco: And Don Chito, when did you see him again?

Mr. Blasini: In Mayaguez.

Q. Did you stay in Yauco from March 8 in the evening to March 9 in the morning? *A.* Yes, sir. I slept in Yauco.

Q. Did you sleep from the eighth to the ninth? *A.* Yes, sir.

Q. And in the morning, did you go to see your attorney? *A.* Yes, sir.

Q. You mean attorney Lopez-de-Victoria, and you engaged him to prepare the deed of lease? *A.* Yes, sir, and I gave him every detail of the business to be done.

Q. The terms and other particulars of the lease? *A.* Yes, sir.

Q. Then, when did you see again my colleague Lopez-de-Victoria? *A.* In Mayaguez.

Q. And Don Chito, did not you see him again that morning? *A.* No, sir.

Q. Did you speak to him? *A.* In Mayaguez.

Attorney Ochoteco: And in Yauco?

Mr. Blasini: I did not see him in Yauco.

Q. Did not you see him again in Yauco? *A.* No, sir.

Q. I move for a two-minute recess.

Judge: The court grants the recess.

[Recess of the court.]

Judge: The session of the court is resumed.

Attorney Ochoteco: We have finished our examination.

Judge: Cross-examination.

Attorney Tormes: Nothing.

Judge: Then, some other evidence.

Attorney Ochoteco: We submit in evidence a certified copy of deed number 41 of March 9, 1937.

Judge: Deed number—?

Attorney Ochoteco: Forty-one, of March 9, 1937, executed before notary Luis Lopez-de-Victoria, in regard to lease, by Mrs. Elvira Olivieri-Commins to the spouses Emilio Blasini Totti and Celia Lluberas Pasarell.

Judge: Of what date?

Attorney Ochoteco: March 9, 1937.

Attorney Tormes: No objection as to Lluberas and Blasini.

Attorney Sabater: No objection.

Judge: No objection, let it be marked Exhibit T of the Plaintiff.

[The paper submitted and admitted in evidence as Exhibit T of the Plaintiff is literally transcribed and attached at the end of this transcript as "Exhibit T of the Plaintiff".]

Attorney Ochoteco: We want to tell the court and ask its forbearance. We have only one more witness, Mr. Gilberto Barbosa-Sicardo, who is on his way here already. He left Mayaguez at two o'clock, but we guess he is about to arrive, and he is our last witness. At the same time we want to inform the court that we are going to submit the other case pending upon the same evidence heard in the present case, if there is no objection from the other side, when the case is called in its turn.

Attorney Tormes: All right. We may agree that Mr. Gilberto Sicardo—

Attorney Ochoteco: Let us agree on the following: We would be ready to stipulate that he would testify— We will accept, as submitted this afternoon, the same testimony given by him in the ejectment ptoceeding instituted by Messrs. Lluberas-Pasarell *v.* Mario Mercado e Hijos, such as the same appears from the transcript of the evidence.

Attorney Tormes: With the single incident that we raise the objection. We are going to read it as if the witness were present, and at the proper time we raise the objection, and then my colleague will argue his points of view and the same will be submitted on what appears there.

Judge: Then, what is the stipulation?

Attorney Ochoteco: I would like to hear my colleague state the stipulation.

Attorney Tormes: It is stipulated as follows—

Judge: It is stipulated and agreed upon.

Attorney Tormes: The same is going to be read now by attorney Ochoteco just as if Mr. Barbosa-Sicardo were on the stand. Reading from the transcript of his testimony in the ejectment suit instituted by Messrs. Lluberas *v.* Mario Mercado e Hijos, before this court, and then this side will raise any objection that in our opinion may be raised as the questions are read, and the court will likewise decide.

Judge: Whose testimony is it?

Attorney Ochoteco: Gilberto Barbosa-Sicardo's.

Judge: Given in what action?

Attorney Ochoteco: In civil case number 1086, of this court, *in re* ejectment proceeding, Manuel F. Lluberas et al., plaintiffs, *v.* Mario Mercado e Hijos, defendants, Hon. Roberto H. Todd, Jr., judge.

Judge: Then let the stenographer start reading the testimony.

Attorney Ochoteco: The stenographer is taking down notes. Your attorney will read it.

[Attorney Ochoteco begins to read the testimony as follows:]

"Defendant [Attorney Ochoteco]: What is your name? *A.* Gilberto Barbosa-Sicardo.

"*Q.* Where are you now employed, what is your employment? *A.* Stenographer of the Superintendent of Public Works in the Department of the Interior.

"*Q.* Do you know Mrs. Elvira Olivieri-Commins? *A.* Yes, sir.

"*Q.* How long have you known her? *A.* Ever since I called on her, together with several gentlemen.

"*Q.* Who are they? *A.* Messrs. Ulises Petrilli, Felix Neri Vazquez, Jose Ramon Peralta, Pastor Mandri and attorney Pedro M. Porrata.

"*Q.* Where was the call made? *A.* At the residence of Mr. Rafael Barletta; on the Guanajibo road, within the municipal district of Mayaguez, Puerto Rico.

"*Q.* What was your purpose in calling there? *A.* It was on the occasion of a notarial act of demand served by attorney Pedro M. Porrata on Mrs. Elvira Olivieri-Commins, and I was acting in my capacity as stenographer, to take down the return of such service.

"Defendant: *Q.* What is your experience as stenographer? *A.* Three years working in the court and in law offices.

"*Q.* Did you hear Mrs. Elvira Olivieri-Commins talking? *A.* Yes, sir. And I took down her statements.

"*Q.* Have you with you the stenographic notebook? *A.* Yes, sir.

"*Q.* Could you read from your notebook what you took down of the conversation of Mrs. Elvira Olivieri-Commins? *A.* Yes, sir. Of course.

"*Q.* How did you take down that conversation? *A.* In shorthand.

"*Q.* As she was talking? *A.* Yes, sir. Her answers to the questions of attorney Porrata. Everything, questions and answers.

"*Q.* Please read out—

"Plaintiff: We object."

Attorney Tormes: When we understand that we must object, we will do so.

Attorney Ochoteco [reading]: "Plaintiff: We object."

Attorney Tormes: Now here it would be "Defendant". Let us save time because that will take a long time. We object to the testimony of this witness as to the statements from Mrs. Elvira Olivieri, on similar grounds as those stated by us yesterday and this morning, in opposition to the testimony of Mr. Peralta. We set up the same grounds, and we call the attention of this court to the way in which that was taken. I call the attention of the court to that detail.

Attorney Sabater: We make the same objection.

Judge: Attorney for plaintiff now.

Attorney Ochoteco: In order that the court may hear a recital of the whole incident, I am going to read the whole of it.

Attorney Tormes: This is a trial *de novo*.

Attorney Ochoteco: The court might as well know what took place on that occasion.

Attorney Tormes: It is unnecessary.

Judge: In his testimony in that case, did the stenographer read from his notebook?

Attorney Ochoteco: He read from his notebook, and I want to read to the court the incident between the attorney Lopez-de-Victoria and your attorney, and which arose on the discussion about the admissibility.

Attorney Tormes: There is a very interesting point, and is as follows: these stenographic notes were taken by the stenographer subsequent to the deal of April 6, 1937, and such notes have been transcribed. Mrs. Elvira Olivieri testified as a witness for the plaintiff, and these notes were never submitted to her so as to give an explanation.

[Attorney Tormes argues thereon.]

Judge: You have agreed upon the reading of some testimony given before Judge Todd in the ejectment proceeding, and the same is subject to an objection, of course. The court allows the reading of all that part of the incident that took place before the other justice.

Attorney Tormes: We take exception to the ruling of the court.

Attorney Sabater: We take exception.

Judge: Please proceed with the reading, and of course the court very emphatically states that this was stipulated by the parties, that the testimony given in the above proceeding be read in this case. The parties agreed upon the reading of that portion of the testimony of Mr. Gilberto Barbosa-Sicardo which is transcribed in that record. It is also stated that upon reading that testimony where formerly the word "plaintiff" appears, "defendant" must now be understood, and vice-versa, because in the

present proceeding the parties are quite the opposite of what they were in that ejectment proceeding.

Attorney Ochoteco [reading]:

"Defendant: Please examine this paper which I am showing to you. What is this paper I am showing you?

"Witness: A transcript of the stenographic notes taken by me of the conversation of Mrs. Elvira Olivieri-Commins.

"*Q.* Who made this transcript? *A.* Myself.

"*Q.* Is this a true and faithful transcript of what you took down there? *A.* Yes, sir.

"Defendant: To be submitted—

"Plaintiff: We object on the grounds stated."

Attorney Tormes: Now we are going to reproduce the same objection, such as if it appeared there when the paper was submitted. Our objection is that it is not admissible on the grounds stated, concerning the testimony of Mr. Peralta yesterday and today, and moreover on account of the way of this reproduction.

Judge: Attention was called to it and the parties have stipulated that that testimony be read.

Attorney Tormes: Just as if Mr. Barbosa were on the stand and the paper were going to be submitted to the court for its consideration. In that case we are going to hand to the court that transcript already made by Mr. Barbosa, for the court to decide whether or not it is admissible.

Attorney Ochoteco: All right. Just a minute. When witness Barbosa-Sicardo was about to read from his notebook the stenographic notes, and as I had with me a typewritten transcript of what was in the notebook, it was agreed between the parties, as appears from the record, that instead of the witness reading from his notebook, that copy should be accepted as the matter read from the notebook.

Attorney Tormes: Was this marked as an exhibit?

Judge: It will be marked as an exhibit.

Attorney Ochoteco: This is an unverified copy and my col-

league may see and read it so that he may see that it is a transcript— The witness may testify to this being a true and faithful transcript of what he took down there of that conversation.

[Attorney Ochoteco reads the following:]

"Plaintiff: Yes, we accept the same as having been read.

"Defendant: Please examine this paper which I am showing you. What is this paper I am showing you?

"Witness: A transcript of the stenographic notes taken down by me of the conversation of Mrs. Elvira Olivieri Commins.

"Who took down those notes? *A.* Myself.

"*Q.* And is it a true and faithful transcript of what you took down there? *A.* Yes, sir.

"Defendant: To be submitted—

"Plaintiff: We object on the grounds set forth.

"Judge: Then, with the same limitation previously suggested by the court, this paper is admitted subject to the value that may be given to it in connection with the legal question raised. It is marked Exhibit Q of the Defendants.

"Plaintiff: We object.

"Defendant: Then that is all with the witness.

"Judge: Cross-examination?

"Plaintiff: None."

Judge: What is it the record says?

Attorney Tormes: That is for the court to see.

Attorney Ochoteco: Then the exhibit was submitted, consisting of the transcript of the stenographic notes.

Judge: Let us make everything plain.

Attorney Ochoteco: When witness Barbosa-Sicardo was on the point of reading from his notebook the shorthand notes which he had taken down of the statements of Mrs. Elvira Olivieri-Commins, and as I had with me a transcript which the witness had made of his notes, I therefore suggested to attorney Lopez-de-Victoria to examine the transcript, and if he agreed with the con-

tents of that transcript, that such transcript could then be offered in evidence, to spare the witness the reading from his own notes.

Judge: Was it submitted and accepted in full?

Attorney Ochoteco: Yes, sir.

Judge: Now, what is that which is sought to be submitted?

Attorney Ochoteco: The same paper copied in the transcript of the evidence in civil case number 1086, regarding ejectment proceeding, Manuel F. Lluberas et al. *v.* Mario Mercado e Hijos.

Judge: Is that note attached to the record of the ejectment proceeding?

Attorney Ochoteco: It is here, at the end of the testimony of the witness.

Judge: In that way it would be more handy.

Attorney Ochoteco: Let us do this—

Attorney Tormes: Subject to our checking it up.

Attorney Ochoteco: Let the clerk or the stenographer himself check it up.

Judge: Here is Sicardo. If later on, in order to study this case I have to carry the whole record home, I would have to carry twenty pounds at least unnecessarily.

Attorney Ochoteco: This appears here marked Exhibit of the Court.

Judge: Now, with these papers, all I have to carry is eight or ten sheets of paper which weigh very little.

Attorney Ochoteco: Let us submit then the memorandum that was submitted in the ejectment proceeding above referred to, which memorandum was marked in that proceeding Exhibit Q, that is, the transcript of the statements taken down by witness Barbosa-Sicardo, of the statements made by Mrs. Elvira Olivieri-Commins in her residence.

Attorney Tormes: We object.

Judge: I understand well the case, but this was done because the witness was not here, and his testimony would take a long time. Which are the objections, if any, from the other side?

Attorney Tormes: That this is self-serving evidence. I refer

to the statements made subsequent to March 10 or 9, 1937, on which day there was executed the contract of sale and lease between Mrs. Elvira Olivieri-Commins and the defendants Messrs. Lluberas and Blasini.

Judge: Is that the objection?

Attorney Tormes: That Mrs. Elvira Olivieri-Commins was present here and she was not shown this matter that had been transcribed and prepared beforehand, in order that she might explain with certainty or might refresh her memory as regards certain circumstances or facts.

[Attorney Tormes argues thereon.

[Attorney Ochoteco argues thereon.]

Attorney Sabater: We make the same objection.

Judge: The court admits the stenographic transcript which is marked Exhibit U. It is admitted. Even though it be the testimony of a witness in the way it has been submitted, it is documentary evidence; it is as if it were a deposition and the same must be marked as documentary evidence. What else?

[The paper submitted and admitted in evidence as Exhibit U of the Plaintiff is literally transcribed and attached at the end of this transcript as "Exhibit U of the Plaintiff".]

Attorney Ochoteco: We waive the testimony of Mr. Pastor Mandri because in our opinion it is cumulative evidence, and his testimony would be in regard to the incident of the service of the notarial act of demand on Mrs. Elvira Olivieri-Commins in her residence. We rest.

Judge: The evidence for the plaintiff is terminated. What is the evidence of the defendants?

Attorney Tormes: Mrs. Elvira Olivieri-Commins has just arrived, but I have to file a motion. I have to file a motion, that is, a motion for nonsuit, so that the court may proceed to render a judgment dismissing the complaint filed herein on the ground of absolute lack of evidence in support of its allegations.

Judge: The other side?

Attorney Ochoteco: We file our opposition.

Attorney Sabater: As regards the defendant Mrs. Elvira Olivieri-Commins, we want to make it known that we also are entitled to file a motion for nonsuit.

Attorney Tormes: I am going to argue thereon.

Judge: I only will permit the statements of the grounds.

Attorney Tormes: Before discussing the motion, we must clear a point, and the point is that the plaintiff or the plaintiffs submit now case number 311 and case number 312, on the same evidence.

Attorney Ochoteco: Let us dispose of one thing and then we will take up the other.

Attorney Tormes: As regards the rescission of the contract—

Judge: There is a motion for nonsuit in order to have the complaint dismissed for lack of evidence.

Attorney Tormes: The only specific allegation of the complaint is the one contained in the paragraph 11, which reads as follows:

> "That prior to March 8, 1937, and on the best information and belief of plaintiff, the aforesaid defendant Elvira Olivieri-Commins, as vendor, and the other defendants, as purchasers, while the option clause inserted in the mortgage deed of March 23, 1932, mentioned in paragraph 3 of this complaint was in force, conspired among themselves with the deliberate purpose of defrauding the plaintiff partnership Mario Mercado e Hijos of its right to exercise the right of redemption as agreed in clause 7 of the aforesaid deed number 13 dated March 23, 1932, executed before notary Fernando Zapater-Martinez acting in the place of Jose Tous-Soto, entered into a contract of sale of the estates and condominiums already described in paragraph 9 of this complaint, and marked with the numbers 2, 3, 4 and 5, the purchase price being $40,000.00, all the defendants having notice of the right of option held by plaintiff Mario Mercado e Hijos at the time of such sale in regard to said holdings."

Judge: Did not we say that there would be no arguing? This question has already been heard by the court more than ten times,

and the court need not hear any further argument thereon. The court understands very well the matter.

Attorney Tormes: I am exceedingly glad that the court has so understood the matter.

Judge: I ought to understand the matter. The point has been submitted so often that the court will have no difficulty in determining it.

Attorney Tormes: My congratulations.

Attorney Ochoteco: We oppose the motion because in our opinion that amounts to a decision by the court upon the merits, and because all and each of the averments of the complaint have been shown, or at least there is certain circumstantial evidence that the court should weigh.

Judge: The court is going to rule upon the point. The court dismisses the motion for nonsuit simply because copious evidence has been submitted for weighing the same, and conformable to the jurisprudence of the Supreme Court, where there is evidence subject to be weighed the sustaining of the motion for nonsuit does not lie. The case must be tried on its merits in order to weigh as a whole the evidence from both sides. This is the ruling of the court, without prejudging the matter either in favor or against either side.

Attorney Tormes: I will not take exception. I will submit evidence. We are ready to submit our evidence, and in half an hour we shall have terminated.

Judge: Evidence for the defendants. And now the court wants to know whether the evidence in both cases is joint or separate?

Attorney Sabater: Joint.

Attorney Tormes: To a certain extent, it will be joint, but the time will come when it will be separate.

Judge: When separate it will be let known. Now it is joint, the same for both sides.

Attorney Tormes: We submit in evidence the record in civil case number 7850, of this court, Belen G., widow of Tous-Soto,

in re utility and necessity, that is, moving for leave in behalf of her minor children and of the incapacitated one.

Judge: What number?

Attorney Tormes: Seven thousand eight hundred fifty.

Judge: Had not this document been submitted?

Attorney Tormes: No, sir.

Attorney Ochoteco: There is no objection.

Judge: It is admitted. We are marking with numbers the exhibits of the defendants.

Clerk: Five are the exhibits of defendants already identified. There are some exhibits which have not been submitted and are identified.

Judge: Then, let us start by marking this paper, which shall be marked Exhibit One (1) of the Defendants. Admitted. Let us take up another paper. Another proof.

[The document submitted and admitted in evidence as Exhibit One (1) of the Defendants is literally transcribed at the end of this transcript as "Exhibit Number One (1) of the Defendants".]

Attorney Tormes: We submit in evidence the record of this court, number 203, Belen G., widow of Tous-Soto, *in re* judicial authorization for the cancellation of the mortgage which Mrs. Belen Gonzalez, widow of Tous-Soto, and her children, had bought from Mario Mercado e Hijos, and which was owed by Mrs. Elvira Olivieri-Commins, one of the defendants herein.

Judge: No objection?

Attorney Porrata: We object.

Attorney Tormes: I will withdraw the same for the present.

Judge: Then, is record number 203 withdrawn?

Attorney Tormes: Yes, sir. We submit in evidence a certified copy of deed number 33, dated May 9, 1933, executed before notary Fernando Zapater-Martinez, *in re* assignment of mortgage credit from Mario Mercado e Hijos to Mrs. Belen Gonzalez, widow of Tous-Soto.

Judge: What is the number of the deed?

Attorney Tormes: Thirty-three, of May 9, 1933.

Attorney Porrata: No objection.

Judge: Admitted and marked Exhibit 2.

[The paper submitted and admitted in evidence as Exhibit 2 of the Defendants is literally transcribed and attached at the end of this transcript as "Exhibit 2 of the Defendants".]

Attorney Tormes: Now I will submit in evidence paper identified by the defendants during the testimony of Mrs. Elvira Olivieri-Commins, that is, the notice of that assignment of credit served by attorney Zapater in compliance with the provisions of the Mortgage Law, upon the mortgagee Mrs. Elvira Olivieri, dated March 8, 1937, together with an unverified copy of the notice of assignment of credit above referred to.

Judge: The other side?

Attorney Porrata: No objection.

Judge: Admitted and let it be marked Exhibit 3.

[The document submitted and admitted in evidence as Exhibit 3 of the Defendants is literally transcribed and attached at the end of this transcript as "Exhibit 3 of the Defendants".]

Attorney Tormes: Please the court, we submit now in evidence the original record of this court, record number 203, Belen G., widow of Tous-Soto, regarding the cancellation of the mortgage referred to in that exhibit.

Attorney Ochoteco: Please the court. We object to the submission in evidence of the petition and decision thereon contained in that record, which is what my colleague seeks.

Attorney Tormes: I also seek the evidence.

Judge: The stenographic record?

Attorney Tormes: Yes, sir.

Attorney Ochoteco: We do not object to the submission of the petition and decision thereon. Our objection refers to the admissibility in evidence of the stenographic record, because we do not consider relevant the submission in evidence of such stenographic record. What matters is the decision thereon which gave rise

to the deed of cancellation of the mortgage submitted in evidence by the plaintiff itself.

[Attorney Ochoteco argues at length on his objection.

[Attorney Tormes argues in favor of the admission of the paper in evidence.]

Judge: The court admits the paper and let it be marked Exhibit 4 of the Defendants.

Attorney Ochoteco: We take exception.

[The document submitted and admitted in evidence as Exhibit 4 of the Defendants is literally transcribed and attached at the end of this transcript as "Exhibit 4 of the Defendants".]

Attorney Tormes: We submit, as ours, Exhibit I of the Plaintiff, that is, the verified copy of deed number 47 dated March 8, 1937, *in re* cancellation of mortgage, executed by Mrs. Belen Gonzalez, widow of Tous-Soto, et al., submitted by the plaintiff, and at the same time, I ask leave for substituting such Exhibit I by another thereof, since the latter conains the notice of record in the registry, which is lacking in the copy offered in evidence by the other side.

Attorney Ochoteco: There is no objection.

Judge: No objection to the substitution?

Attorney Ochoteco: No objection.

Judge: Then, Exhibit I of the Plaintiff will be substituted and shall be considered as evidence for both sides. Let it be marked Exhibit 5 of the Defendants.

[The documents submitted and admitted in evidence as Exhibit 5 of the Defendants is truly and faithfully transcribed on page 312 of the transcript of the documentary evidence, which is attached at the end of this transcript.]

Attorney Tormes: We make ours Exhibit B of the Plaintiff, that is, verified copy of deed number 40 dated March 9, 1937, executed before notary Luis Lopez-de-Victoria.

Judge: No objection?

Attorney Ochoteco: None.

Judge: Admitted as evidence and marked Exhibit 6 of the Defendants.

[The document submitted and admitted in evidence as Exhibit 6 of the Defendants is literally transcribed on page 260 of the transcript of the documentary evidence, attached to this transcript.]

Judge: Some further evidence for the defendants.

Attorney Tormes: We submit as our evidence Exhibit G of the Plaintiff, which is a copy of deed number 30, of voluntary mortgage, dated February 25, 1937, executed in Mayaguez by Mrs. Elvira Olivieri-Commins and Mr. Manuel Francisco Lluberas-Pasarell. We make it ours, but we ask the leave of the court to substitute this copy of the deed by a similar one in our possession, but which contains the notice of record in the registry of property.

[Attorney Ochoteco examines the paper submitted by attorney Tormes.]

Attorney Ochoteco: No objection.

Judge: No objection to the substitution?

Attorney Ochoteco: None.

Judge: Then Exhibit G of the Plaintiff is marked Exhibit 7 of the Defendants. Admitted.

[The document submitted and admitted in evidence as Exhibit 7 of the Defendants is literally transcribed on page 303 of the transcript of the documentary evidence which is attached at the end of this transcript.]

Attorney Tormes: We submit now in evidence the four promissory notes, which gave rise to the cancellation of the mortgage and which gave rise to the mortgage in favor of Mario Mercado e Hijos, assigned to the widow of Mr. Jose Tous-Soto.

Judge: Are these papers separate or joined together?

Attorney Porrata: To whom are payable such promissory notes?

Attorney Tormes: To the bearer by endorsement.

Judge: To the bearer by endorsement. No objection?

Attorney Ochoteco: None.

Judge: Admitted and marked as a single exhibit. They are marked Exhibit 8.

[The papers submitted and admitted in evidence as Exhibit 8 of the Defendants are literally transcribed and attached at the end of this transcript as "Exhibit 8 of the Defendants".]

Attorney Tormes: We submit in evidence a certificate issued by the registrar of property of Ponce on November 10, 1939, to the effect that it does not appear from the Registry of Property that Mario Mercado e Hijos, the partnership Mario Mercado e Hijos, nor anybody else made any reservation as to the clause of option to purchase and lease, contained in the deed of mortgage securing such promissory notes, and which was assigned by Mario Mercado e Hijos to Mrs. Belen Gonzalez, widow of Tous-Soto, and her children, and cancelled by Mrs. Belen Gonzalez, widow of Tous-Soto.

Attorney Ochoteco: We object, and our objection refers to the following particular of that certificate, where it is said on page seven: "that from the records just copied and which originated in the aforesaid deeds, it does not appear that the partnership Mario Mercado e Hijos, or anybody else, had made any reservation regarding the option to purchase and lease referred to in the record of the mortgage which was assigned and cancelled." Our objection is as follows: that a registrar of property is not empowered by any statute to issue negative certificates, regarding any particular of the entries on the books of his registry. That his duties are ministerial, exclusively clerical, of literally copying what may appear from the books of his registry. A registrar cannot, under any statute, to do what [*sic*] what has been done by the registrar of the property of Ponce in the present case.

[Attorney Ochoteco argues at length on his objection.]

Judge: Is there any literal certificate of the description of the estate?

Attorney Ochoteco: There is a certificate, but he cannot say that from such a record such thing does or does not appear. He cannot state conclusions.

[Attorney Ochoteco argues thereon.]

Judge: Does the objection refer to the conclusion?

Attorney Ochoteco: It refers to the whole of paragraph three of the certificate.

Judge: This need not be discussed at length

Attorney Ochoteco: I would like to cite you to some jurisprudence.

Judge: Let me have it.

Attorney Tormes [Ochoteco]: The registrar of propesty of Ponce issued a negative certificate of something that does not appear from his books.

[Attorney Tormes [Ochoteco?] argues at length thereon.]

Judge: He says "that from the records just copied and which originated in the aforesaid deeds, it does not appear that the partnership Mario Mercado e Hijos, or anybody else, had made any reservation regarding the option to purchase and lease referred to in the record of the mortgage which was assigned and cancelled". Here is the gist of the question. So that he refers to the estates which are literally described, and that is why the court has stated that not much discussion is needed to be able to determine the point.

Attorney Ochoteco: I was going to cite the case—

Judge: There is no question at all. As regards what has been literally copied, the same is so far admissible.

Attorney Ochoteco: We agree.

Judge: Is the ground of the objection the conclusion in the third paragraph?

Attorney Ochoteco: Yes, sir.

Judge: Then this court will admit the certificate upon the following condition: that if the conclusion set forth by the registrar in the third paragraph of this certificate is supported by the literal transcription of the estates made in the certificate itself, the court will take the same into consideration, and if the same is not so supported, the court shall not be bound to take it into consideration. This means, that the court does not admit the whole

certificate, only the literal transcriptions. And that the other is a question that might be helpful to the court. So that the court will never be bound by the conclusion of the registrar, but that it will examine the literal transcriptions.

Attorney Ochoteco: All right. I think that the court is guided by a high regard for justice, but we desire to cite to the court the decision in *Cuadra et al. v. Lopez et al.*, 35 P.R.R. 433, where it is held that no conclusion or statement made by a registrar of property is admissible in evidence.

[Attorney Ochoteco argues thereon and cites 43 P.R.R. 46; 14 P.R.R. 302; and 27 P.R.R. 750.]

Attorney Tormes: This is very simple. The mortgage law authorizes a registrar of property to issue negative certificates as to a fact that does not appear in the registry.

[Attorney Tormes argues thereon.]

Judge: There is a question here for determination. Of course, this jurisprudence amounts to the same thing that this court was saying, although the court does not have it before it. It must be borne in mind that this certificate begins with the fourteenth record of the estate, that is, the assignment of the credit. The certificate begins here. Preceding this one, there are thirteen more. This certificate begins from record fourteen, which mentions the assignment of the credit in favor of Mrs. Belen, widow of Tous-Soto.

Attorney Ochoteco: Record 12 of estate number 534.

Judge: And at the end it says—

Attorney Tormes: The point is very clear. The registrar certifies negatively that something does not appear from his registry. According to the law, a registrar may negatively certify to something that does not appear from his registry.

Judge: From that certificate of the registrar it does not appear—

Attorney Tormes: That is just what we say and that is all. We maintain that it is a negative certificate of something that does not appear from the registry. That is all.

Judge: The court is going to pass upon this so as not to waste much time, and of course in the spirit already exposed and jurisprudence cited. The court admits the certificate in every particular except in that of its third paragraph, which is transcribed in the record, and which is a conclusion of the registrar. That is, that part thereof which says: "that from the records just copied and which originated in the aforesaid deeds, it does not appear that the partnership Mario Mercado e Hijos, or anybody else, had made any reservation regarding the option to purchase and lease referred to in the record of the mortgage which was assigned and cancelled". It is admitted, except the paragraph 3 of the certificate, and is marked Exhibit 9 of the Defendants.

[The paper submitted and admitted in evidence as Exhibit 9 of the Defendants is literally transcribed and is attached at the end of this transcript as "Exhibit 9 of the Defendants".]

Attorney Tormes: As we have done with former exhibits, we will make ours Exhibit T of the Plaintiff, which the verified copy of deed number 41 of March 8, 1937, *in re* lease, executed by Mrs. Elvira Olivieri-Commins, in favor of Mr. Emilio Blasini-Totti.

Attorney Ochoteco: No objection.

Judge: Then, Exhibit T of the Plaintiff is admitted as Exhibit of the Defendants, and is marked Exhibit 10 of the Defendants. Admitted.

[The paper submitted and admitted in evidence as Exhibit 10 of the Defendants is literally transcribed beginning at page 375 of the transcript of the documentary evidence, and attached at the end of this transcript.]

Attorney Tormes: Now, as oral evidence, we submit the testimony of Mrs. Elvira Olivieri-Commins.

Judge: A five-minute recess.

[Recess of the court.]

Judge: The session of the court is resumed.

Attorney Sabater: We make ours the evidence submitted by my colleague Tormes.

Judge: Then the fact is recorded that all the above evidence

introduced by attorney Tormes is the evidence for all the defendants.

TESTIMONY OF MRS. ELVIRA OLIVIERI-COMMINS.

Attorney Tormes: Your name, madam?

Mrs. Olivieri: Elvira Olivieri-Commins.

X-Q. Have you been sworn in? *A.* Yes, sir.

X-Q. Where were you yesterday? *A.* In Yauco, sick.

Attorney Ochoteco: We admit that she was not in the courtroom.

Attorney Tormes: Do you know Mr. Peralta?

Mrs. Olivieri: Yes, sir.

Attorney Tormes: Do you remember that on April 6, 1937, Mr. Peralta called at your house together with attorney Porrata, and some other people? *A.* In 1937?

X-Q. About April 6, in Mayaguez? *A.* Yes, sir. He did call.

X-Q. Do you remember having talked in the presence of those other people with the gentleman to whom I am referring? *A.* A lot of people called, and I was frightened.

X-Q. Why were you frightened? *A.* Because some of them were in their shirt sleeves and carrying revolvers.

X-Q. Who were carrying revolvers? *A.* I do not remember. I know that I got frightened. As I am a sick person, anything upsets me. I suffer from high pressure, and nerve crisis.

X-Q. Were you warned by anybody that they were going to take down in shorthand what you might say? *A.* I do not remember; I do not think so.

X-Q. While you were talking, was anybody writing down? *A.* No, sir.

X-Q. Do you ever remember Mr. Porrata putting to you the following question: "Tell me, dona Elvira, were not you required when selling the 'Indios' estate, to lease the 'Juanita' estate to Millo?" And that you answered: "When dona Elena offered me the money, $40,000—"

Mrs. Olivieri: That is not true.

X-Q. Did you say that? *A.* That is not true.

Attorney Tormes: Let me finish. "—for the 'Indios' estate, she asked me to lease to her the 'Juanita' estate, for the benefit of her daughters, all of it as a special condition in the event of her buying the estate from me. I accepted because I thought it was a good business, and as I had the rope already almost to my neck, I was broken, I could help it— I also was assisted by counsel." *A.* I did not see Elena.

X-Q. Did you see Mrs. Elena Pasarell? *A.* No, sir. The only thing I said to him was that Elena had a lot of money and could [*sic*] money to her children, to buy it. That is what I said.

X-Q. Did you ever accept or say that you had sold to Mr. Manuel Francisco Lluberas and his sisters or that you had leased to Emilio Blasini the estate "Juanita" prior to March 9, 1937?

Mrs. Olivieri: When Emilio brought me the promissory notes, I then told Millo, "Well, tell Chito to come to draw up the deed of sale."

Attorney Tormes: Did not you say to him that you had sold before March nine? *A.* No, sir.

X-Q. Or that you had agreed to anything prior to March 9, 1937? *A.* No, sir. Subsequent to the payment.

X-Q. And when was it that you consented to sell; prior or subsequent to having effected the payment? *A.* Subsequent to the payment we then took up the negotiations.

X-Q. Tell me, it is said here that attorney Porrata read out to you this clause of option to purchase and lease. Was this clause read out to you? *A.* They did not read that out to me.

X-Q. Did they read out to you the seventh clause of the deed of mortgage? Was this clause read out to you by attorney Porrata? *A.* I do not remember his having read that.

Attorney Tormes: This is all for the present.

Judge: Some further examination?

Attorney Sabater: I make the above examination my own.

Judge: Anything further?

Attorney Ochoteco: Just a moment. I am examining the above

record in the ejectment proceeding. Dona Elvira, have you nothing to ratify or explain as to your statements both this afternoon before the court and on the day when you gave the above testimony? Have you no explanation to make?

Mrs. Olivieri: I have already testified.

Q. Do you remember, dona Elvira, having explained before this court, and I refer to the District Court of Ponce, presided by the Judge R. H. Todd, Jr., in a certain ejectment proceeding, instituted by Messrs. Lluberas-Pasarell against Mario Mercado e Hijos, in regard to the "Indios" estate, in regard to this ejectment proceeding? Do you remember whether you testified?

Attorney Tormes: We object because I have confined myself to examine her in regard to what took place in Mayaguez on April 6, and no other evidence can be brought in.

Judge: The other side.

Attorney Ochoteco: Please the court, the lady has stated that she did not say anything to attorney Porrata, nor to the people who called on her in her home that afternoon, that is to say, the statements set forth in the foregoing exhibit, that is, the stenographic notes taken by Mr. Barbosa-Sicardo. Now I desire to put to her the same questions that I put to her in the other case to which I have referred, inasmuch as she answered the questions just as appears from that stenographic record.

Judge: I think that the lady wishes to say something.

Mrs. Olivieri: I was going to say that they may write anything they please. I cannot know what a stenographer might write. They might have brought fifty witnesses without my knowing it. When all those people arrived I got nervous. I suffer from some serious illness, and I got very sick.

Judge: The court understands well all that, but it wants also to say that the attorneys are doing their duty and that is why they put such questions to you, of course treating you with the utmost consideration. They cannot help doing their duty.

Mrs. Olivieri: They should treat me with a little more consideration.

Attorney Ochoteco: I have done so, dona Elvira, and I will do so. Our purpose is not to annoy you.

Judge: You may put the question to her.

Attorney Ochoteco: Dona Elvira, do you remember, when testifying in the ejectment proceeding before Judge Todd, that the following question was put to you (it was I who put the question): "Was not it exactly on the day when the deed of purchase and lease was signed that you had made up your mind to sell the estate, but you had already sold and leased it before that day?"

Attorney Tormes: We object. She has already answered and it has been explained several times that she leased and sold after having paid.

Mrs. Olivieri: How is that?

Attorney Ochoteco: I am reading the question which appears on page 599 of the transcript of the evidence in the above ejectment proceeding, civil number 1086 of this court. Do not you remember my putting to you this question in the ejectment proceeding? Do not you remember whether I put that question to you in the ejectment proceeding?

Mrs. Olivieri: How is the question that you read?

Attorney Ochoteco: "Was not it exactly on the day when the deed of purchase and lease was signed that you had made up your mind to sell the estate, but you had already sold and leased it before that day?"

Judge: This is the question.

Attorney Ochoteco: Do you remember whether I put that question to you? *A.* I remember that—

Q. Dona Elvira, you will excuse me, because I want to finish as soon as possible. My question is whether you remember that I put that question to you, if you remember it well. *A.* Perhaps I might not remember. It was two years ago.

Q. Might I have put it to you, or might I have not?

Mrs. Olivieri: Yes, sir.

Attorney Ochoteco: Do you remember having answered the question; having expressed yourself as follows (and I am reading

from page 599 of the said stenographic record): "No, sir. I first sold and then paid." *A.* How could I say that?

Q. Then you answered as follows: "No, sir. How can I consent to some thing before it is done." "And when was the agreement reached?" "After the payment was made." "And when was the payment effected?" "I do not remember." Do you remember that incident? *A.* Maybe. It is now two years since that.

Q. Dona Elvira, would you or could you assert to this court that on the day referred by you in your testimony, as to the call made on you by those gentlemen at your residence in Mayaguez, there was no stenographer for taking down your words? *A.* I saw many people going in.

Q. Did you see Mr. Peralta going in? *A.* Yes, sir.

Q. Was he the manager of the Central? *A.* Yes, sir.

Q. Do you know Mr. Mandri?

Mrs. Olivieri: Yes, sir, and the others. On seeing so many people I got frightened.

Mr. Ochoteco: Might not the stenographer have been there without your seeing him? *A.* Yes, sir.

Q. That is all with the lady.

Judge: Any other evidence for the defendants?

Attorney Tormes: Please the court, the defendants Lluberas-Pasarell have no other evidence to introduce.

Attorney Sabater: I want to state that this party makes his all the evidence submitted, and we rest.

Judge: Then the evidence submitted by the defendants is joint evidence.

Attorney Sabater: Yes, sir.

Judge: Then, both sides rest.

Attorney Ochoteco: We submit the case. I think that both cases may be submitted on the same evidence, and a joint brief might be filed in both cases.

Judge: Then this case is terminated. Call the other case.

Clerk: Civil case number 312, Mario Mercado e Hijos *v.* Elvira Olivieri-Commins, *in re* rescission of contract of lease, etc.

Judge: Between the same parties?

Attorney Ochoteco: The same parties.

Clerk: This case includes Emilio Blasini Totti. The case is Mario Mercado e Hijos *v.* Elvira Olivieri-Commins and Emilio Blasini-Totti, defendants, *in re* rescission of contract of lease and other particulars.

Attorney Tormes: We represent defendants Emilio Blasini and his wife, and attorney Lopez-de-Victoria and your attorney represent Mrs. Elvira Olivieri.

Attorney Sabater: I represent attorney Jose O. Sabater.

Judge: Is there any stipulation?

Attorney Ochoteco: The stipulation between the parties represented by their respective counsels is that this case be submitted on the same evidence submitted in civil case number 311, Mario Mercado e Hijos *v.* Elvira Olivieri-Commins et al., it being understood that the evidence submitted in the former case is the same that would be submitted in the present case.

Attorney Tormes: With the same incidents.

Judge: Is there anything to be added or suppressed from the evidence?

Answer: Nothing. The case is submitted on the same evidence as the former case.

Judge: The court approves the stipulation. Now, as to the argument of both cases.

Attorney Ochoteco: Plaintiff proposes to argue the case by means of briefs.

Judge: The other side?

Attorney Tormes: I agree.

Attorney Sabater: I agree.

Judge: As to the initiative?

Attorney Ochoteco: Taking into account that the evidence is very copious, your plaintiff needs the stenographic record for the preparation of its brief. The stenographer has told me that he is extremely busy and that he needs thirty days to be able to finish

the transcript. We ask to be allowed thirty days for filing our brief; a similar term to the defendants; and fifteen days for our reply brief.

Attorney Tormes: And a similar term to us for filing our reply brief. Shall we submit consolidated briefs?

Attorney Ochoteco: No, no.

Judge: Then thirty days to each, the plaintiff to file his brief first, and five days to each side for filing their respective reply briefs.

Attorney Ochoteco: I would suggest that instead of five days we should be allowed ten days. As a rule the reply brief is more aggressive.

Judge: Then ten days to the plaintiff and ten days to the defendants for their respective reply briefs. Therefore, the evidence for both sides having been heard, there only remains the filing of briefs. The court adjourns.

I, Justo M. Bodon, court stenographer of the District Court for the Judicial District of Ponce, Puerto Rico, do hereby certify:

That the foregoing is a true and faithful transcript of the shorthand notes taken by me, in the course of the trial of the above-entitled cases; that said shorthand notes were truly and faithfully represent the statements made during the said trial, including the testimony of the witnesses, orders, decisions and proceedings of the court, as well as the objections, exceptions and statements from counsel for both sides.

I further certify that on this day I have filed a certified copy of this transcript with the record of each of the above-entitled cases, and likewise I have delivered a certified copy thereof to each of the attorneys for the parties.

And for the purpose of the appeal taken to the Supreme Court of Puerto Rico from the judgments rendered in the above-entitled cases, I issue the present certificate in Ponce, Puerto Rico, this tenth day of December, 1941.

JUSTO M. BODON,
Court Stenographer.

EXHIBIT A OF THE PLAINTIFF.

(A true copy of its original.)

No. 73.

ACTUAL PARTITION OF RURAL ESTATES HELD IN COMMON AND OTHER PARTICULARS.

In the City of Yauco, Island of Puerto Rico, on the 20th of August of the year 1936.

Before Me

Tomas Paz y Ruiz, attorney and notary public for said Island, having his domicile and keeping an office in the City of Yauco.

There Appear

Mrs. Elvira Olivieri Commins, of age, single by reason of divorce, property owner and domiciled in the City of Mayaguez; and Mrs. Santia Olivieri Commins and her husband Narciso Ferrer, both of age, married to each other, property owner and domiciled in the City of Yauco; and,

Jose R. Peralta, of age, married, manager of the Central Rufina and domiciled in Mayaguez, which he will prove whenever called upon to do so.

I Certify to my personal knowledge of the above parties and to the truth of their statements as to being of age, married and as to their professions and domiciles.

They Assert to have, and in my opinion they do have, the legal qualifications necessary and sufficient for the execution of the present deed.

And by Virtue Thereof the contracting parties state as follows:

First:—That Mrs. Elvira Olivieri Commins and Mrs. Santia Olivieri Commins are the undivided joint owners, share and share alike of the following estates:

Number One:—A piece of rural property known as Juanita lying in the Pueblo and Quebrada barrios within the municipal

district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the Rufina plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said Rufina plantation; on the west by land of the San Rafael plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to Piedras Blancas barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

Title:—This estate was made up by a consolidation made according to deed No. 169, executed before notary Angel Padro, of Yauco, and dated November 28, 1907.

Number Two:—A piece of rural property known as Los Indios lying in the Indios barrio within the municipal district of Guayanilla with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Company and by mangroves of the maritime zone; on the south by the Yauco river and by land of Mercedes plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

Title:—This estate was acquired by them by inheritance from their mother, Josefa Commins Raldiris, deceased, as appears from record No. 1, on Fol. 222 of Volume 12 of Guayanilla, estate No. 711, First Record of consolidated property.

Second:—That both estates are at present leased in their entirety to Mario Mercado e Hijos, by deed No. 50, executed in Ponce on April 5, 1927, before notary Francisco Parra Capo for a period of ten years which began to run, as regards estate No. 1, called Juanita, as from March 4, 1928, and maturing on similar day and month of the year 1938, and as regards estate No. 2, called Indios, the time would be computed as from June 2, 1927, to mature on similar day and month of the year 1937.

Third:—Liens. That the undivided half interest owned by Mrs. Santia Olivieri Commins in estate No. 2, above described, is encumbered by a voluntary first mortgage originally executed in favor of the agricultural civil partnership, Mario Mercado e Hijos, domiciled in Guayanilla, by deed No. 12, executed in Mayaguez on March 23, 1932, before notary Fernando Zapater Martinez, acting in the place of his colleague Jose Tous Soto, an authentic copy of which is shown to the notary, whose terms literally transcribed are as follows:

"First:—Mrs. Santia Olivieri Commins, with the consent of her husband Narciso Ferrer y Sardo, and in payment of the amount owed by them to the partnership Mario Mercado e Hijos, as stated in the preceding third paragraph, execute and deliver to said partnership, through the attorney-in-fact, Arturo Cortes Valls, five promissory notes payable to bearer by indorsements, to fall due all of them on March 23, 1939, and subscribed by said debtors for the following amounts:—Promissory note No. One for $3,000.00 as principal, $800.00 for interest thereon and $200 for costs and disbursements.

"Promissory note No. Two for $3,000.00 as principal, $800.00 for interest thereon and $200.00 for costs and disbursements.

"Promissory note No. Three for $3,000.00 as principal, $800.00 for interest thereon and $200.00 for costs and disbursements.

"Promissory note No. Four for $3,000.00 as principal, $800.00 for interest thereon and $200.00 for costs and disbursements.

"Promissory note No. Five for $4571.10 as principal, $1,200.00 for interest thereon and $200.00 for costs and disbursements.

"Said promissory notes (which differ from each other only in their correlative numbers and amounts) are drafted as follows: 'No. . For $. To become due on March 23, 1939. We promise to pay to the holder by indorsement of this promissory note on day 19 , the sum of received to our entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. , of a series of five, totalling $. To secure the above sum, $ for interest thereon and $ for costs, expenses, disbursements and attorney's fees we have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 12 of even date before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, upon a one-half interest belonging to us in a jointly owned estate called Los Indios lying in the Indios barrio of the municipal district of Guayanilla, Puerto Rico, and having an area of 430 cuerdas. It is stipulated that by failing to pay three semi-annual installments of interest when becoming due, the obligor shall forfeit the right to avail herself of the term for the payment of the principal and this promissory note may be recovered by summary or ordinary proceedings. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) SANTIA O. DE FERRER.
N. FERRER.

"'Affidavit No. . Subscribed before me by the spouses Mr. Narciso Ferrer Sardo and Mrs. Santia Olivieri Commins, both of age, property owners and domiciled in Yauco, Puerto Rico, to whose personal knowledge I certify in Mayaguez on March 23, 1932.

(Sgd.) F. Zapater, Notary Public.'

(There is affixed thereto the notarial seal and affixed thereto and cancelled a $0.25 internal revenue stamp.

"Second:—Mrs. Santia Olivieri y Commins with the express consent of her husband Mr. Narciso Ferrer y Sardo, constitutes voluntary mortgage upon her jointly owned interest in the estate above described, to secure all and each of the promissory notes referred to in the foregoing clause, which lien shall encumber such condominium until the mortgage hereby constituted is legally cancelled. Said mortgage will secure in addition to the principal of the aforesaid promissory notes, the sum of $4,400.00 for interest and $1,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery and demandable as a penalty in such event without the necessity of a liquidation.

"Third:—Mrs. Santia Olivieri y Commins, with the express consent of her husband Mr. Narciso Ferrer y Sardo, and Mr. Arturo Cortes Valls in behalf of the partnership Mario Mercado e Hijos, appraise the mortgaged condominium at $50,000.00 and waive any appraisal or action for such purpose.

"Fourth:—Mrs. Santia Olivieri Commins, with the express consent of her husband Mr. Narciso Ferrer y Sardo, agrees with the partnership Mario Mercado e Hijos that out of the rentals to which they are entitled under the contract of lease referred to in the second paragraph of this deed, that is, the sum of $4,100.00, said partnership shall retain, to be applied to the payment of the interest accrued, the sum required to cover the above amount, such retention to begin

on June 2, 1932, and so on every time the same becomes due, that is, on March 4 and June 2 of each year.

"Fifth:—It is stipulated that by failing to pay three installments of interest upon becoming due, the obligors shall forfeit the right to avail themselves of the term allowed for paying the principal and the obligee may recover judicially on all or either of the promissory notes my [*sic*] means of a summary or an ordinary action.

"Sixth:—If at the termination of the contract of lease referred to in paragraph second of this instrument the mortgage promissory notes have not been paid, the obligors or their assignees or successors in interest bind themselves to impose upon any lessee the obligation to deduct from the rentals agreed upon the necessary sums for the payment of the interest owing to Mario Mercado e Hijos and to effect such payment to said partnership on the account of the obligors, as stipulated in clause 4 of this deed.

"Seventh:—Option to Purchase and Sell and to Lease:—Notwithstanding the foregoing clause the debtors, as part of the consideration of this contract, agree with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease their undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtors shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to them and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtors cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee.

"Eighth:—Waiver of Homestead. Mrs. Santia Olivieri y Commins, with the express consent of her husband Narciso Ferrer y Sardo, states that no homestead right has been constituted by her upon her joint interest in the mortgaged estate nor has she the intention of constituting it, but should she do so in the future, from now and for all time, she waives the same in favor of the partnership Mario Mercado e Hijos, its assignees, successors in interest, in consideration of the present contract.

"Ninth:—Cancellation. In consideration of the present mortgage, the partnership Mario Mercado e Hijos proceeds to cancel the mortgage constituted by Mrs. Santia Olivieri y Commins in favor of said partnership and which has been referred to in the third paragraph of this instrument, willing and consenting that such cancellation be recorded in the proper registry of property.

"Tenth:—The parties hereto expressly agree that the obligors may pay at any time before maturity the amount of any of the promissory notes above mentioned and interest thereon, provided they give notice to the obligees three months prior to the time when they intend to effect such payment.

"Eleventh:—The parties likewise agree that the actual partition of said estate cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force.

"Twelfth:—The parties likewise expressly state that the lessors have received all back rentals up to date regarding the estate described and that in the present case they have received a check for $1,500.00 on the Banco de Ponce in settlement of the annual installment becoming due in the current month of March.

"Thirteenth:—All the expenses incurred by reason of the present deed, copy thereof and record in the registry of

property and those of cancellation, copy thereof and record shall be for the account of and chargeable to the obligors.

"Fourteenth:—The parties hereto agree to the present deed as the same is drafted in conformity with the terms agreed upon by them; and I the notary in compliance with the statute advised them as to the law as applicable in the premises."

As Regards the Undivided Half Interest in Estate Number One owned by the party hereto, Mrs. Santia Olivieri Commins, the same is free from any mortgage lien but subject to said lease.

Liens Affecting Mrs. Elvira Olivieri Commins: That the undivided half interest owned by the appearing party Mrs. Elvira Olivieri Commins in each of the above two estates, are subject, besides said lease, to another voluntary first mortgage originally executed in favor of the said partnership Mario Mercado e Hijos to secure an indebtedness amounting to $41,256.89, constituted by deed No. 13 executed in Mayaguez on March 23, 1932, before notary Fernando Zapater Martinez, acting in the place of his colleague Jose Tous Soto, an authentic copy of which is shown also to the notary, whose terms literally transcribed, are as follows:

"First:—Mrs. Elvira Olivieri Commins, in payment of the amount owed by her to the partnership Mario Mercado e Hijos, as stated in the preceding third paragraph, executes and delivers to said partnership through the attorney-in-fact, Arturo Cortes Valls, four promissory notes payable to bearer by endorsement, to fall due all of them on March 23, 1939, and subscribed by said lady for the following amounts:

"Promissory note No. One for $10,000.00 as principal, $2,000.00 for interest thereon and $500.00 for costs.

"Promissory note No. Two for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"Promissory note No. Three for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"And promissory note No. Four for $11,256.89 as principal, $3,000.00 for interest thereon and $500.00 for costs.

"Said promissory notes shall differ from each other only in their correlative numbers and amounts. They are as follows:

"'No. . For $. To become due . I promise to pay to the holder by indorsement of this promissory note on day, 193 , the sum of . received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. , of a series of four, totalling $. To secure the above sum, $ for interest thereon and $ for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called Juanita, with an area of 481.77 cuerdas more or less, lying in the Pueblo and Quebrada barrios of the municipal district of Guayanilla, Puerto Rico, and the other, called Los Indios, with an area of 430 cuerdas, lying in the Indios barrio of the municipal district of Guayanilla, Puerto Rico, Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) ELVIRA OLIVIERI.

"'Affidavit No. . Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Yauco, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater, Notary Public.'

(There is affixed thereto and cancelled a $0.25 internal revenue stamp and affixed thereto the notarial seal.)

"Second:—Mrs. Elvira Olivieri Commins constitutes a voluntary mortgage upon her jointly owned interests in each of the estates above described to secure all and each of the promissory notes referred to in the foregoing clause, which lien shall encumber such condominiums until the mortgage hereby constituted is legally cancelled. Said mortgage will secure in addition to the principal of the aforesaid promissory notes the sum of $11,100.00 for interest thereon and $2,000.00 for costs, expenses, disbursements and attorneys fees in case of judicial recovery and demandable as a penalty in such event without the necessity of a liquidation.

"Third:—Mrs. Elvira Olivieri y Commins and Mr. Arturo Cortes y Valls, in behalf of the partnership Mario Mercado e Hijos, appraise the mortgaged condominiums, waiving any new appraisal or action for such purpose, as follows:

"The jointly owned interest in the estate described in the first place at $25,000.00.

"The jointly owned interest in the estate described in the second place at $50,000.00.

"Fourth:—Mrs. Elvira Olivieri Commins agrees with the partnership Mario Mercado e Hijos, that out of the rentals to which she is entitled under the contract of lease referred to in the second paragraph of said deed, that is, the sum of $4,100.00, said partnership shall retain, to be applied to the payment of the interest accrued, the sum required to cover the above amount, such retention to begin on June 2, 1932 and so on every time the same becomes due, that is, on March 4 and June 2 of each year.

"Fifth:—It is stipulated that by failing to pay three installments of interest upon becoming due, the obligor shall forfeit the right to avail herself of the term allowed for paying the principal and the obligee may recover judicially on all or either of the promissory notes by means of a summary or an ordinary action.

"Sixth:—If at the termination of the contract of lease

referred to in paragraph second of this instrument the mortgage promissory notes have not been paid, the obligor or her assignees or successors in interest bind themselves to impose upon any lessee the obligation to deduct from the rentals agreed upon the necessary sums for the payment of the interest owing to Mario Mercado e Hijos and to effect such payment to said partnership on the account of the obligor, as stipulated in clause 4 of this deed.

"Seventh:—Option to Purchase and Sell and to Lease:—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee.

"Eighth:—Waiver of Homestead. Mrs. Elvira Olivieri Commins states that no homestead right has been constituted by her on any of the estates hereinbefore described, but that should she do so in the future, from now on and for all time, she waives the same in favor of the partnership Mario Mercado e Hijos, its assignees or successors in interest, in consideration of the present contract and during the life thereof.

"Ninth:—It is stipulated by the parties that the obligor

may pay at any time before maturity the mortgage credit herein constituted or to pay on account thereof any amount not below $5,000.00, provided she serves notice on the obligee three months prior to the time when she intends to effect the payment of the principal or the sum on account of such principal.

"Tenth:—The parties likewise expressly state that the lessor has received all back rentals up to date regarding the estate described and that in the present case she has received a check for $1,500.00 on the Banco de Ponce in settlement of the annual installment becoming due in the current month of March.

"Eleventh:—The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force.

"Twelfth:—For the purpose of the Registry, the mortgage lien affecting the condominiums is prorated as follows:

"The jointly owned interest in the estate described in the first place shall answer for:

"The sum of $12,379.08 as principal,—

"The sum of $3,330.00 as interest,—

"The sum of $600.00 for costs.

"And the jointly owned interest in estate No. 2 shall answer for the sum of $28,877.81 as principal,—

"The sum of $1,400.00 for costs, expenses and attorney's fees, and for interest on $7770.00.

"Thirteenth:—All the expenses incurred by reason of the present deed, copy thereof and record in the Registry of Property and those of cancellation at the proper time, copy thereof and record shall be for the account of the obligor.

"Fourteenth:—Each of the parties hereto, as far as the same is concerned, agree to the present deed in every respect as conformable to the terms agreed upon.

"At this stage, the parties hereto state that the sum men-

tioned in paragraph 3 of this deed owed by Mrs. Elvira Olivieri y Commins to the partnership Mario Mercado e Hijos, amounting to $41,256.89, represents the whole amount of her indebtedness up to date, including everything."

Explanation Concerning Mrs. Santia Olivieri y Commins. For a better understanding, it is now explained that in the mortgage deed constituted by Mrs. Santia Olivieri y Commins previously mentioned, the following fact, which precedes the terms above described was set down, which literally transcribed reads as follows:

"Third:—That Mrs. Santia Olivieri Commins and her husband Narciso Ferrer Sardo acknowledge to owe to Mario Mercado e Hijos the following sums:

"In current account with liquidated interest up to date, $7282.50.

"A mortgage credit constituted by said spouses, according to deed No. 67, dated July 30, 1924, executed before notary Carlos F. Chardon. The same is recorded in the Registry of Property of Ponce on Folio 229 of Volume 12 of Guayanilla, estate No. 524, Record , for $6,000.00, amounting with liquidated interest up to date to $9288.60. Total: $16,571.10.

"Fourth:—That by common consent of the herein parties, said estate Juanita was surveyed, which survey resulted in the following area and description:

"Rural:—An estate known as 'Juanita' lying in the Pueblo and Quebrada barrios of the municipal district of Guayanilla, P.R., with an area of 81.77 cuerdas of flat land applied to sugar canes and 378.91 cuerdas of wood and pasture land, and a water pump for irrigating said canes and a frame house with the galvanized-iron roof in poor condition. It is bounded on the north by land of the Heirs of Antonio Ramos, of Jesus Rodriguez, of Ricardo Rodriguez, of Dr. Jose Cobian, and of the Heirs of Lugo and a municipal road

separating land partly of Mario Mercado e Hijos; on the south by land of Mario Mercado e Hijos and partly by a municipal road separating land of said concern, by land of Santia de la Cruz de Pacheco, of Catalina Tirado and of Mario Mercado e Hijos; on the east by land of the aforesaid Mario Mercado e Hijos; on the northwest by land of the Heirs of Antonio Ramos and of Joaquin Diaz; and on the west by land of Joaquin Diaz, of Herminia Morales, and the woodland of the San Rafael plantation, of the Heirs of Angela and Dario Franceschi; on the southwest by land of Mario Mercado e Hijos. This estate is crossed from south to the northwest by the tracks of the American Railroad Company of Puerto Rico. Its area is 460.68 cuerdas equivalent to 181 hectares, 6 ares and 57 centiares."

And for the purpose of this actual partition the interested parties Mrs. Santia and Mrs. Elvira Olivieri Commins mutually agree in appraising and assessing said estate at $25,000.00 as its present value, each of them being therefore entitled to one-half of such sum.

Fifth:—Appraisal and Partition with Segregations of the Estate "Los Indios".—And likewise, the appearing parties, Mrs. Santia and Mrs. Elvira Olivieri Commins, for the purpose of the present actual partition, mutually agree in appraising and assessing the estate "Los Indios" described in the first paragraph of this deed, marked No. 2, in the sum of $50,000.00, each of them being entitled to one-half thereof because according to their estimates such is its present value; and having surveyed the same for the purpose of this partition, the same turned out to contain within its boundaries, an area of 477.77 cuerdas, equivalent to 187 hectares, 78 ares, 27 centiares and 21 miliares, showing an excess of 47.77 cuerdas over its recorded area above referred to, and based on the area of the above survey they proceed to partition said estate and it is hereby partitioned into the following parcels or segregations:

Parcel No. One: Rural. A parcel of land containing 79.46

cuerdas, equivalent to 31 hectares, 23 ares, 8 centiares, 79 miliares, lying in the Indios barrio within the municipal district of Guayanilla, which are subdivided in the following five parcels, which, according to the plat of the survey made by engineer Juan Herminio Sanchez Diaz on December 5, 1935, which according to a blue print which the notary has before him, are marked as follows: Parcel "A" with an area of 41.26 cuerdas known by the name of Cupey of flat land planted to sugar canes; Parcel "B" containing 4 cuerdas of flat land, planted to sugar canes; Parcel "C" having 20.52 cuerdas of semiflat land at present planted to lesser crops; Parcel "D" containing 1.78 cuerdas of semiflat land planted to lesser crops; and Parcel "E" containing 12 cuerdas of semiflat land planted to lesser crops. The whole tract is bounded as follows: on the north by land of Santia Olivieri, the track of the American Railroad Company and from the west angle of Parcel "D" by the municipal road leading from Guayanilla to the Boca barrio; on the south by land of Arturo Lluberas and nephews, by the Yauco river, by a 0.30-cuerda undivided parcel containing the pump and belonging to Santia and Elvira Olivieri Commins, and with land of Santia Olivieri Commins; on the east by land of Santia Olivieri, and on the west by land of Mariano Lugo, by land of Ramon Ramirez, and by an old road which divided land of Ramon Lluberas, Luis Cervoni, Dolores Lopez and land of Luis Cervoni and on the southwest land of Arturo Lluberas and nephews. The fact is recorded that all along the east there is a private road belonging to Santia and Elvira Olivieri, 6-meter wide, which proceeds along the west side of Parcel "B" as far as the undivided 3.30-cuerda parcel where the irrigation pump stands. Within this tract, but enclosed by said Parcel "C" there is a small parcel of land jointly owned by Santia and Elvira Olivieri with an area of 0.25-cuerda and there is built thereon a small house with a concrete foundation for a pump. And it is hereby explained that the aforesaid parcels marked letters "E" and "D" are separated, the former, partly on its east side, by the road leading from Guayanilla to Boca barrio and the

latter by the railroad track, both in connection with Parcel "C", and the former is also separated in connection with the latter by the said railroad track.

Parcel No. Two:—Portion or parcel of saltpeter land lying in the Indios barrio of the municipal district of Guayanilla and bounded: on the north by land of Mario Mercado e Hijos; on the south with a cano within the land of Santia Olivieri; on the east by the Caribbean Sea and on the west by a 6-meter wide road, three meters of which is part of this parcel and the other three meters part of the parcel of land belonging to Santia Olivieri. Its area is 41.99 cuerdas, equivalent to 16 hectares, 50 ares, 37 centiares and 7 miliares of saltpeter land.

Parcel No. Three:—Parcel of land lying in the Indios barrio of the municipal district of Guayanilla, which will hereinafter be called Los Indios, with an area of 355.77 cuerdas, equivalent to 139 hectares, 83 ares and 18 centiares, which according to the kind of land for the purposes of cultivation may be divided as follows: the first parcel is of an area of 165.84 cuerdas of hilly land devoted to woods and brush and a portion of semiflat land applied now to lesser crops and the remaining four parcels appear in another survey made by said surveyor Sanchez Diaz, dated the same as the other, a blue print of which is shown to the notary and marked with their respective areas as follows: Parcel "F" of flat land planted to sugar canes with an area of 140.64 cuerdas; Parcel "G" with an area of 3.20 cuerdas of flat land not under cultivation; Parcel "H" measuring 12.90 cuerdas of semiflat land devoted now to lesser crops; and Parcel "I" with an area of 33.19 cuerdas of saltpeter land. This estate is bounded on the north by a local road separating almost in all its whole length land belonging to Mario Mercado e Hijos, and land of Isabel Santiago, of Arturo Lluberas and of the widow of Pedro Torres; on the northeast by land of Mario Mercado e Hijos and of the Heirs of Juana Damasa Martinez and by land again of Mario Mercado e Hijos and of Mrs. Elvira Olivieri; on the east by the Caribbean Sea; on the south by the Yauco river and by land of Arturo Llu-

beras y Sobrinos; and on the west by land of Mariano Lugo, of Ramon Ramirez and by another land of Mariano Lugo and by land of Mrs. Elvira Olivieri and by the undivided parcel measuring 0.30 of a cuerda of Mrs. Santia and Elvira Olivieri. On the southwest of this parcel there lies the 0.30-cuerda undivided parcel above referred to reached by a road called the pump road, six meters wide all along its length, which road belongs to Mrs. Elvira and Mrs. Santia Olivieri in the proportion of three meters each. There is built thereon a frame house with the galvanized iron roof in poor condition, with walls in a ruinous condition and a stack and several frame houses with galvanized-iron roof for lodging peons. It is hereby explained that the aforesaid first parcel of hilly and semiflat land lies on the north side of the railroad track and of the municipal road leading to Boca barrio of Guayanilla; and over Parcel "H" there is a railroad track built by the Central Rufina which leads to the latter.

Parcel No. Four:—An undivided rural parcel measuring 0.30 of a cuerda equivalent to 11 ares, 79 centiares and 12 miliares with a small house thereon fenced and roofed with galvanized-iron, with a steam pump with every accessory and pipes for pumping water from the Yauco river for the irrigation of the estates belonging to Santia and Elvira Olivieri, situated in the Indios barrio of the municipal district of Guayanilla and bounded as follo[illegible]e north by land belonging to Elvira Olivieri Commins; on the south by the Yauco river; on the east by land belonging to Santia Olivieri Commins and on the west by land belonging to Elvira Olivieri Commins.

Parcel No. Five:—Rural: an undivided parcel of land measuring 0.25 of a cuerda, equivalent to 9 ares, 82 centiares and 60 miliares, possibly destined to have installed thereon a pump for drawing water from adjacent springs, with a cement foundation with a small house roofed and fenced with galvanized-iron and pipes. This parcel of land is situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north, west and east by Parcel "C" of the estate belonging to

Elvira Olivieri Commins; and on the south by Parcel "A" known as Cupey from the same estate of Elvira Olivieri Commins.

Assessed Value of the Five Parcels in which the Estate Los Indios Has Been Divided and Segregated:—

As above set forth the whole of the estate Los Indios was appraised at $50,000.00, and the purpose of the present partition such parcels are assessed by mutual agreement between the interested parties Mrs. Elvira and Mrs. Santia Olivieri Commins as follows:—

Parcel No. One at $11,425.00;—

Parcel No. Two at $800.00;—

Parcel No. Three at $36,875.00;—

Parcel No. Four, the land thereof at $100.00 and the pump with all its accessories at $700.00; and,

Parcel No. Five at $100.00.

All the above assessments amount to $50,000.00 at which the whole of the aforesaid estate Los Indios was assessed.

Sixth:—Termination of the Joint Ownership and Valuation of the Jointly Owned Estates.—Consequently Mrs. Santia and Mrs. Elvira Olivieri Commins hereby resolve to put an end to their joint ownership in the estates described and called Juanita and Los Indios, which have been previously assessed, the former at $25,000.00 and the latter at $50,000.00, totalling $75,000.00, each of them therefore being entitled to the sum of $37,500.00, respectively, and to that effect they ratify the partition of the aforesaid estate Los Indios into the five parcels such as the same are described in the foregoing paragraph fifth of this deed with the values therein stated and in order to satisfy the sums to which each is entitled, they proceed to make the following adjudications:—

Mrs. Elvira Olivieri Commins is entitled to the sum of $37,500.00 and in satisfaction thereof the following properties are allotted to her:—

First: Full ownership of the estate described by the name of

Juanita in the fourth paragraph of this deed consisting of 460.58 cuerdas and at the assessed value of $25,000;—

Second: The full ownership of Parcel No. One described in the fifth paragraph of this instrument consisting of 79.46 cuerdas and valued at $11,425.00;—

Third: The full ownership of Parcel No. Two known as saltpeter land described in No. Two of the fifth paragraph of this deed and valued at $800.00;—

Fourth: The $50.00 undivided half interest in the $100-worth Parcel No. Four described under this same number in the fifth paragraph of this instrument, consisting of 0.30 of a cuerda and a $175-worth interest in the value of the pump standing on said parcel, which pump was appraised at $700.00, making a total of $225.00 of the value of the said land and pump; and,

Fifth: The $50.00 undivided half interest in the $100-worth Parcel No. Five described under the same number in the fifth paragraph of this deed, consisting of 0.25 of a cuerda.

Total amount adjudicated to Mrs. Elvira Olivieri Commins: the sum of $37,500.00, which is the value of her share in the property held in common received by her in full settlement thereof.

Mrs. Santia Olivieri Commins is entitled to the sum of $37,500.00 and in satisfaction thereof, the following properties are allotted to her:—

First: Full ownership of Parcel No. Three, now also called Los Indios which is described under this number in the fifth paragraph of this deed, consisting of 355.77 cuerdas with all its appurtenances and annexes and at the assessed value of $36,875;—

Second: The $50 undivided half interest in the $100.00-worth Parcel No. Four described under this same number in the fifth paragraph of this instrument consisting of 0.30 of a cuerda and a $175-worth interest in the value of the pump standing on said parcel, which pump was appraised at $700.00, making a total of $575.00 of the value of the said land and pump.

Third: A $50.00 undivided half interest in the $100.00-worth

Parcel No. Five described under this number in the fifth paragraph of this deed, consisting of 0.25 of a cuerda.

The total sum adjudicated to Mrs. Santia Olivieri Commins is $37,500.00 which is the value of her share in the property held in common received by her in full settlement thereof.

Supplementary Conditions

First:—Life of the Contract of Lease and Distribution of the Rentals:—

The present dissolution of the joint ownership between Mrs. Santia and Mrs. Elvira Olivieri Commins in connection with the aforesaid estates Juanita and Los Indios is made without prejudice to the continuation in force until its expiration of the existing lease in favor of Mario Mercado e Hijos, which will continue to exist until the same is extinguished in the same manner and extension as if this partition had not taken place; but the lease rent shall be distributed as follows: the lease rent corresponding to the estate Los Indios from June, 1936, to June, 1937, shall be distributed and paid in equal shares, that is $2,600 for each of them; the annual lease rent corresponding to the estate Juanita from March, 1937, to March, 1938, the prorated share from March, 1937 to be counted from the 4th of said month to June 2, 1937 shall be distributed and paid in equal shares to Mrs. Elvira and Mrs. Santia Olivieri Commins, and the remainder of said lease rent shall belong in full to Mrs. Elvira Olivieri Commins.

Second:—Final Conveyance of Ownership and Inheritance Rights.—Mrs. Santia and Mrs. Elvira Olivieri Commins, in full payment of their holdings, mutually convey to each other full ownership of each of the properties adjudicated to each of them, including every title, right or interest that they may have in said properties.

And by virtue thereof, Mrs. Santia and Mrs. Elvira Olivieri Commins mutually execute to each other the respective total release and acquittance.

Third:—As each of the above parties is entitled to three meters,

that is, half the width of the pump road which is six meters wide and which leads from the Boca barrio road as far as the 0.30 of a cuerda undivided parcel, both parties bind themselves to neither close nor narrow it, each party being entitled to the use without limitation of the road for the traffic of vehicles, fruits, workmen, etc.

The repairs of the above mentioned road shall be for the account of both parties or their successors in equal shares.

Fourth:—As the properties adjudicated to Mrs. Santia Olivieri need for the irrigation the waters proceeding from the springs existing on the lands of Cupey adjudicated to Mrs. Elvira Olivieri Commins and whose waters follow their natural course to the sea through the lands of Mrs. Santia Olivieri Commins, it is agreed to this effect by both parties as follows:

(A) Mrs. Elvira Olivieri and/or her successors in interest are entitled to draw, by means of pumps for the purpose of irrigation, water from the Gran Zanja, from the springs and/or from the subsoil, in the Parcels "A", "B" and "C" of Parcel No. One, only during fifteen days of each month, and during these fifteen days exclusively they may feed with water from the Gran Zanja, from the springs, and/or from the subsoil, any reservoir that they might build. Mrs. Elvira Olivieri Commins and/or her successors in interest may also feed said reservoir with water from the Yauco river during the seven and one-half days hereinafter mentioned in clause fifth, and put up any pump close to the said artificial lake for drawing, for the purpose of irrigation, the waters therein collected, the operation of which not being confined to a certain number of days. Mrs. Santia Olivieri and/or her successors in interest are entitled to draw by means of pumps, for the purpose of irrigation, waters from the Gran Zanja from the springs of the Guardarraya tract and/or from the subsoil, in their flat lands and in Parcel "H" of Parcel Three, without any limitation as to the number of irrigation days, and they may feed one or more of the reservoirs that they might build with water from the Gran Zanja, from the Guardarraya tract and/or from

the subsoil; without any limitation of time whatever. Mrs. Santia Olivieri and her successors in interest may also feed their reservoir or reservoirs with waters from the Yauco river during the days allotted to her, under clause fifth, and to draw, by means of pumps for irrigation purposes, the waters collected in said reservoir or reservoirs without any limitation of time whatever.

(B) Both parties agree not to obstruct without justification the flow of the waters through their respective lands in such a way as to injure the other party and they agree to keep unobstructed the main ditch known as Gran Zanja, it being understood that both parties and/or their successors in interest may on their respective lands employ plugs, dams, etc. for momentarily stopping the flow of waters and divert them towards their other land for the purpose of irrigation. Either of the parties and/or their successors in interest may in their respective land open ditches connected with the Gran Zanja for irrigation purposes through gravity.

(C) Both, the waters from the Gran Zanja and from Cupey springs, as well as those drawn from the subsoil in the lands adjudicated to Mrs. Elvira Olivieri Commins from the estate Los Indios, or those that might be dammed or collected in any reservoir built by them, cannot be diverted nor carried on any account by Mrs. Elvira Olivieri Commins and/or her successors in interest to land other than that adjudicated to her out of the Los Indios estate under the present agreement, nor thrown into the Yauco river, since it is expressly agreed that the surplus of said waters have and will continue to have their exit through the flat lands adjudicated to Mrs. Santia Olivieri Commins.

(D) Each one of the parties and/or their successors in interest are entitled to set up an irrigation pump on the 0.25-cuerda undivided parcel close to the Cupey springs with its corresponding pipes for drawing water from the above springs and/or from the subsoil, on condition that the pump which Mrs. Elvira Olivieri Commins and/or her successors in interest might set up may only be operated during the fifteen days of each month allotted under

subdivision (a) of the present clause, and that of Mrs. Santia Olivieri Commins and/or her successors in interest may be operated only on the remaining days of each month, it being agreed that such limitation shall be complied with even in the event that only one of the co-owners should install a pump on said undivided parcel. Mrs. Elvira Olivieri Commins and/or her successors in interest shall allow over their land the laying down of the pipes of the pump that Mrs. Santia Olivieri Commins and/or her successors in interest might set up on the undivided tract and shall moreover grant them the right of way for vehicles and persons traveling in the direction of these undivided parcels in their farm work over an alley four meters wide which starting from the main road leading to the estates Los Indios shall continue along the south side of the railroad track of the American Railroad Company as far as the 0.25-cuerda undivided parcel. Mrs. Santia Olivieri Commins and/or her successors in interest shall allow the laying down of the pipes for the pump which Mrs. Elvira Olivieri Commins and/or her successors in interest may set up on said parcel or of any pump to be set up on their own lands over the semiflat land adjudicated to Mrs. Santia Olivieri Commins on the north side of the road leading to the Boca barrio. The small house and pipes at present existing on said parcel belong in their entirety to Mrs. Elvira Olivieri Commins. If by mutual consent both parties decide to set up a pump for common use on the said small house, in such case both the small house and the pipes shall become jointly owned property and Mrs. Santia Olivieri Commins and Mrs. Elvira Olivieri Commins and/or their successors in interest shall mutually allow right of way for the pipes of the pump that might be installed through their respective land above mentioned in this clause. Whether either party sets up their own pump, or whether a jointly owned pump is set up, the maintenance expenses of the said alley four meters wide shall be for the account in equal shares of Mrs. Santia Olivieri Commins and Mrs. Elvira Olivieri Commins or their successors. Neither of the parties or their successors in interest

may carry the water drawn by the pump or pumps to be set up on the said parcel to lands other than those adjudicated by the present agreement of the estate Los Indios nor throw them in the Yauco river. Mrs. Elvira Olivieri Commins and/or her successors may feed with water drawn by their own pump that might be set up on said parcel any reservoir built by them on their own lands during the already mentioned fifteen days. Mrs. Santia Olivieri Commins and/or her successors shall not keep peons lodged on the aforementioned 0.25-cuerda parcel without the consent of the other party.

(E) Neither of the parties and/or their successors shall set up any irrigation pump on their respective semiflat and semihilly lands on Parcels "D" and "E" of Parcel No. One and of the first parcel of tract No. Three, that is, the land lying on the north of the railroad track of the American Railroad Company and of the road leading to the Boca barrio without the express and formal consent of the other party or successors. It is however stipulated that each of the contracting parties or their successors may set up on their respective semiflat or semihilly lands herein mentioned a wind mill or small pump exclusively for domestic use and for watering cattle. If either of the parties or their successors should purchase subsequent to this agreement semiflat or semihilly lands adjoining or close to the semiflat lands adjudicated to Mrs. Elvira Olivieri Commins in the estate Los Indios, which correspond to Parcels "C", "D" and "E" of tract No. One, such party shall not set up any irrigation pump on the lands so purchased.

(F) Mrs. Elvira Olivieri Commins and/or her successors shall be entitled to the use of the water from the Gran Zanja in that part thereof bordering on the saltpeter-land parcel adjudicated to her for the irrigation of any present or future crop planted thereon and to open ditches in the sides of the Gran Zanja on their saltpeter-land parcel for their improvement by irrigation, but they shall not divert or carry said waters outside the said parcel nor to make plugs or dams on this part of the Gran Zanja to the prejudice of any crop grown on lands of Mrs. Santia Olivieri Commins.

It is agreed that neither of the contracting parties and/or their successors in interest shall be entitled to change the present course of the Gran Zanja over the way at present occupied by it adjoining the said saltpeter-land tract, without the express consent of the other party. Mrs. Santia Olivieri Commins and/or her successors in interest may likewise use on the opposite bank the waters of the Gran Zanja and open ditches for irrigation and for the improvement of their saltpeter-land tract.

(G) Neither of the parties and/or their successors in interest may, without the express and formal consent of the other party, use, donate, assign, or sell for industrial purposes, the right to the use of the waters flowing through their respective lands adjudicated from the estate Los Indios, or of those collected in reservoirs on said lands or of those drawn from the subsoil therein or of the undivided parcels, or of those drawn from the Yauco river by means of pumps set up on such lands.

Fifth:—The steam pump set up on the 0.30-cuerda undivided parcel, as hereinbefore agreed, belongs, three parts thereof, to Mrs. Santia Olivieri Commins and one-fourth thereof to Mrs. Elvira Olivieri Commins, Mrs. Elvira Olivieri Commins and/or her successors in interest being entitled to seven and one-half irrigation days in each month for the use of the waters from the Yauco river on their lands, and Mrs. Santia Olivieri Commins and/or her successors in interest shall be entitled to the remaining days of the month. Mrs. Elvira Olivieri Commins and/or her successors in interest shall be entitled to set up a pump on the bank of the Yauco river, either on the 0.30-cuerda undivided parcel or on her own lands, for the irrigation with waters from the river of her lands, and Mrs. Santia Olivieri Commins and/or her successors in interest shall be entitled to set up one or more pumps close to the river, either on her own land or on the undivided parcel, for the same purpose but each of the parties and/or her successors in interest shall comply with the limitation as to irrigation days above mentioned. Should either party or her successors in interest request and obtain for herself an irrigation franchise

for the use of the waters from the Yauco river, such party shall observe this limitation of seven and one-half days for one of the parties and the remaining days of the month for the other party. Should both parties decide to change the operating system of the present steam pump for any other system, Mrs. Santia Olivieri Commins shall bear three-fourths of the expenses and Mrs. Elvira Olivieri Commins one-fourth thereof and each of them shall be entitled to the number of irrigation days to which she is restricted as hereinbefore in this clause. The expenses incurred for any repairs to such pump, whether driven by steam or in some other way, shall be distributed in the proportion of three-fourths to be borne by Mrs. Santia Olivieri Commins and/or her successors in interest and one-fourth thereof to be borne by Mrs. Elvira Olivieri Commins and/or her successors in interest, should the pump be used by each of the parties.

Sixth:—Under this agreement, days are understood to be natural days of twenty-four hours. The seven and one-half days per month corresponding to Mrs. Elvira Olivieri Commins and/or her successors in interest for irrigation purposes may be used either at a stretch or by dividing them into four weekly equal parts, and the fifteen monthly days to which they are entitled for drawing, on their own land and on the 0.30-cuerda parcel, water from the Gran Zanja, from the springs or from the subsoil or for feeding any reservoir, may be similarly used. The monthly irrigation days corresponding to Mrs. Santia Olivieri Commins and/or her successors in interest for drawing water from the Yauco river may be used by her either at a stretch or by dividing them in four weekly equal parts.

Seventh:—Mrs. Santia Olivieri Commins and/or her successors in interest shall permit Mrs. Elvira Olivieri Commins and/or her successors in interest the passage of vehicles, produce, persons and animals used in farming work along the pump road towards parcel "B" or vice versa, over an alley four meters wide belonging to Mrs. Santia Olivieri Commins located on the north side of

parcel "B", on condition that the only thoroughfare shall be only over that part of the alley adjoining the said parcel.

Eighth:—Mrs. Elvira Olivieri Commins and/or her successors in interest shall have access to the siding of the railroad track leading to Central Rufina and which is located within the estate Los Indios adjudicated to Mrs. Santia Olivieri Commins in order that the former may load wagons with the fruits grown upon the land adjudicated to her in connection with the parcels Nos. 1 and 2. To this effect there is established in favor of Mrs. Elvira Olivieri Commins and/or her successors in interest a permanent right of way through an alley six meters wide from the main road already named the pump road within land of parcel No. 3 adjudicated to Mrs. Santia Olivieri Commins as servient tenement, the dominant tenement being parcel number one, said alley ending at the aforesaid siding. If for any reason such siding could not be used any longer and Mrs. Santia Olivieri Commins and/or her successors in interest build upon it a track to be connected with the track of the American Railroad Company of Puerto Rico and Mrs. Elvira Olivieri Commins and/or her successors in interest wish to take advantage of it, she will be allowed to buy a one-fourth interest therein by paying Mrs. Santia Olivieri Commins and/or her successors in interest one-fourth of the cost of said track and its accessories.

Ninth:—It is herein explained that the servitude referred to in paragraph "D" of the fourth clause shall be in favor of parcel No. three as dominant tenement with respect to the 0.25-cuerda undivided parcel, as part of the dominant tenement, and parcel No. One as servient tenement.

Tenth:—Mrs. Santia Olivieri Commins within the land adjudicated to her known as Parcel No. Three, as servient tenement, constitutes in favor of parcel No. Two known as Salistrosa (saltpeter land) belonging to Mrs. Elvira Olivieri Commins or her successors in interest, as dominant tenement, a right of way consisting of a lane four meters wide which starts from the pump road, goes through the Guardarralla portion of the servient tene-

ment and ends at said Salistrosa parcel for the use of workmen's, vehicles and as the entry and exit of the farm development of the dominant tenement.

Eleventh:—Neither of the parties or their successors may, without the express consent of the other, lodge peons or help within the limits of the 0.30 cuerda undivided parcel.

Twelfth:—As the estates Juanita and Los Indios have been planted to sugar canes and lessee, Mario Mercado e Hijos, has gone on doing the same, any sugar quota that may be assigned to said estates under the Costigan-Jones Act or by the Secretary of Agriculture of the United States of America shall be divided up in equal shares for the land adjudicated to Mrs. Santia and Mrs. Elvira Olivieri Commins.

Thirteenth:—The mortgages constituting a lien upon the respective condominiums which formerly belonged to Mrs. Santia and Mrs. Elvira Olivieri Commins in the two estates which have been involved in the dissolution of the joint ownership, will continue as a lien in every respect upon the parcels respectively adjudicated to said mortgagors.

Fourteenth:—It is herein recorded, for a better understanding, that the bearings and distances of the flat portion of the "Juanita" estate, according to the plat drawn up by surveyor Juan Herminio Sanchez on December 5, 1935, are as follows:

Starting from point No. One marked with an iron post in a northern direction, 33 degrees and 56 minutes east, a distance of 20.69 meters to point No. Two, another iron post. From here towards the north, 52 degrees and "0" minutes east, a distance of 53.91 meters to point No. Three, another iron post. From here bearing north, 10 degrees with 10 minutes west, a distance of 206.96 meters to point No. Four, another iron post. From here bearing north, 76 degrees and 6 minutes east, a distance of 108.17 meters to point No. Five, another iron post. From here bearing north, 30 degrees and 57 minutes east, a distance of 32.51 meters to point No. Six, another iron post. From here bearing north, 20 degrees and 30 minutes east, a distance of 43.51 meters to point

No. Seven, a "jobo" tree. From here bearing north, 9 degrees, 21 minutes west, a distance of 52.58 meters to point No. Eight, a "tartago" tree on the edge of the road leading to Piedras Blancas. From here bearing south, 80 degrees and 17 minutes west, a distance of 307.53 meters to point No. Nine, at the edge of the aforesaid road. From here bearing south, 5 degrees and 58 minutes east, a distance of 28.39 meters, to point No. Ten, at the edge of the same road. From here bearing south, 5 degrees and 24 minutes east, a distance of 36.87 meters to point No. Eleven, at the edge of the same road. From here bearing south, 21 degrees and 13 minutes east, a distance of 38.27 meters to point No. Twelve, at the edge of the same road. From here bearing south, 11 degrees and 45 minutes east, a distance of 35.31 meters to point No. Thirteen, at the edge of the same road. From here bearing south 55 degrees and 1 minute west, a distance of 45.65 meters to point No. Fourteen, at the edge of the same road. From here bearing south, "0" degrees and 54 minutes west, a distance of 56.05 meters to point No. 15, at the edge of the same road. From here bearing south, 9 degrees and 22 minutes east, a distance of 126.35 meters to point No. Sixteen, at the edge of the same road. From here bearing south, 15 degrees and 45 minutes west, a distance of 31.31 meters to point No. Seventeen, at the edge of the same road. From here bearing south, 5 degrees 35 minutes west, a distance of 26.93 meters to point No. Eighteen, at the edge of the same road. From here bearing south, 83 degrees 54 minutes east, a distance of 29.59 meters to point No. Nineteen, an iron post. From here bearing south, 20 degrees 30 minutes west, a distance of 35 meters to point No. Twenty, an iron post at the southeast corner of the old cholera cemetery. From here bearing north, 75 degrees "0" minutes west, a distance of 16.99 meters to point No. Twenty-One, a "quenepo" tree. From here bearing south, 24 degrees 32 minutes west, a distance of 54.26 meters to point No. Twenty-Two, an avocado tree. From here bearing south, 11 degrees 34 minutes east, a distance of 108.87 meters to point No. Twenty-Three, a "moca" tree. From

here bearing south, 3 degrees 31 minutes east, a distance of 26.10 meters to point No. Twenty-Four, a stake. From here bearing south, 19 degrees 8 minutes west, a distance of 83.77 meters to point No. Twenty-Five, an iron post. From here bearing south, 23 degrees 31 minutes west, a distance of 28.12 meters to point No. Twenty-Six, another iron post. From here bearing south, 34 degrees 10 minutes west, a distance of 60.95 meters to point No. Twenty-Seven, another iron post. From here bearing south, 4 degrees 47 minutes east, a distance of 37.17 meters to point No. Twenty-Eight, another iron post. From here bearing south, 21 degrees 19 minutes west, a distance of 67.81 meters to point No. Twenty-Nine, another iron post. From here bearing south, 24 degrees 52 minutes west, a distance of 49.36 meters to point No. Thirty, another iron post. From here bearing south, 21 degrees 18 minutes west, a distance of 34.29 meters to point No. Thirty-One, another iron post. From here bearing south, 14 degrees 30 minutes east, a distance of 31.26 meters to point No. Thirty-Two, another iron post. From here bearing south, 6 degrees 58 minutes west, a distance of 51.27 meters to point No. Thirty-Three, another iron post. From here bearing south, 77 degrees 56 minutes east, a distance of 307.80 meters to point No. Thirty-Four, another iron post. From here bearing north, 19 degrees 1 minute east, a distance of 699.35 meters to point No. Thirty-Five, an iron post at the edge of the estate road, and from here bearing north, 70 degrees 15 minutes west, a distance of 253.51 meters to the starting point, that is, point No. One where the survey of the estate began, these boundaries enclosing, after deducting 2.06 cuerdas of the right of way of the American Railroad Company, a net horizontal area calculated by double longitude; 32 hectares, 13 ares, 87 centiares, 99 miliares, equivalent in insular measures to 81.77 cuerdas, which survey was made with transit and stadia.

At point No. Fourteen, at the edge of the road leading to Piedras Blancas, starts the hilly land of the Juanita estate, which hilly land is bounded on the north by land of Dr. Jose Cobian and that of the Heirs of Lugo, that of Ricardo Rodriguez, that of Jesus

Rodriguez, and that of the Heirs of Antonio Ramos; on the northwest by land of the Heirs of Antonio Ramos and that of Joaquin Diaz; on the west by land of Joaquin Diaz, that of Mrs. Herminia Morales, and the hilly land of the plantation San Rafael of the Heirs of Dona Angela and Don Dario Franceschi; on the south by land of Mario Mercado e Hijos and partly by a local road which separates land of the above people, land of Santia de la Cruz de Pacheco, a local road and land of Catalina Tirado as far as to point No. Seventeen at the edge of the road leading to Piedras Blancas, this hilly land of the Juanita estate being separated from the flat land by the road leading to Piedras Blancas on the east, the area of such hilly land measuring 378.91 cuerdas.

Fifteenth:—The parties hereto agree among themselves and request of the Registrar of Property of Ponce that on making the record in their respective names of the estates respectively adjudicated to them, in accordance with the present deed, to transcribe all and every one of the supplementary conditions of the present dissolution of joint ownership.

Sixteenth:—It is hereby explained that Mrs. Santia Olivieri Commins and/or her successors in interest may use the monthly irrigation days corresponding to the pump that might be set up on the 0.25-cuerda undivided parcel either at a stretch or distributing them in four weekly equal parts.

Seventeenth:—Mr. Narciso Ferrer Sardo, as the husband of Mrs. Santia Olivieri Commins, gives the latter his express consent concerning all the acts and agreements hereby entered into by his aforesaid spouse, and approves in every respect this deed as far as he is concerned.

Eighteenth:—It is stated by the parties herein that the partnership Mario Mercado e Hijos appears in this deed through its attorney-in-fact, Jose R. Peralta, solely and exclusively for the purpose of the consent given by said partnership as interested in the mortgage credits above mentioned to the partition of the jointly owned properties carried out therein, but that it does not bind itself by, nor is it responsible for, the stipulations contained

in the clauses of the present deed and that, as far as said partnership is concerned, any of said clauses affecting its rights as present lessees of the estates and adjoining property owners of the estate Los Indios shall be held as nonexistent.

Niheteenth:—The parties hereto Mrs. Santia Olivieri Commins and her husband Mr. Narciso Ferrer Sardo and Mrs. Elvira Olivieri Commins and Mr. Jose R. Peralta as the attorney-in-fact of Mario Mercado e Hijos fully aware of the whole contents of this deed, accept the same in all its parts and in those parts concerning them individually because the same has been drafted pursuant to a previous agreement. The parties hereto affix their signatures to all the folios on the left margin except the last folio which is signed by the parties, the witnesses and the notary.

At this stage, I, the notary, instruct the parties hereto regarding their rights and duties under the law and pertinent herein of which they are duly informed.

The parties hereto execute the present deed before the witnesses Juan Fernandez Menendez and Armando Ramirez Baez, personally known to me, of age, domiciled in Yauco and without any legal impediment to act as such.

This deed has been read by me, the notary, at one sitting and aloud to the parties and the witnesses, having waived their right to read it themselves and all and each of them fully ratify it and all of them sign with me, the notary, who certify and attest as to all the particulars set forth in this public instrument.

(Sgd.) ELVIRA OLIVIERI.
SANTIA OLIVIERI.
N. FERRER.
J. R. PERALTA.
JUAN FERNANDEZ.
ARMANDO RAMIREZ.

Signeted, Sealed, Paraphed and Signed:

Tomas Paz Y Ruiz.

There have been affixed the signatures of all the parties on the left margin of the original deed. (There are affixed five internal revenue stamps worth as follows: one, $10.00; another, $5.00; another, $3.00; another, $1.00; and another, $0.50; all of them duly cancelled.)

This is a true and faithful copy of its original No. 73 in the current protocol of public instruments, under my charge and custody, to which I refer, and at the request of the party, Mrs. Elvira Olivieri Commins, I issue the present first copy with a notice thereof on the margin of its original and in witness whereof I signet, sign, paraph and affix the notarial seal and the proper internal revenue stamps. Yauco, Puerto Rico, August 20, 1936. I Certify:—

(Sgd.) TOMAS PAZ Y RUIZ.

The signet, seal and paraph of said notary are affixed to all the folios of this deed and moreover the internal revenue stamps duly cancelled amounting to $7.90.

At the back of the last page there is affixed in the first place a $0.25 internal revenue stamp and the seal of the Registry with the legend:

"Presented at 10:00 A.M. on this day, Entry Folio 264 of Volume 185 of this district. Ponce, P.R., March 1, 1937."

The Registrar (Sgd.) Miguel Planellas.

There is stamped the seal of the Registry of Property. Underneath the $0.50 internal revenue stamp the following words appear:

"Cancelled a $0.50 internal revenue stamp. No. 1."

Further down the following handwritten notice appears:

"This instrument is recorded only as regards the following estates: Property described under No. One of First paragraph and the estates Nos. One, Two, Four and Five of the Fifth paragraph, and this is noted down on the margin of the

description of each one of said estates. The estate marked in the first place bears the following liens: a mortgage in favor of the partnership Mario Mercado e Hijos which was the subject of record No. 10, regarding one-half of this estate and another one for $41,256.89 as principal and conveyed according to record No. 12 to Mrs. Belen Gonzalez Salicrup, widow of Tous, and her children, and the lease in favor of the partnership Mario Mercado e Hijos which was the subject of record No. 11, and the properties indicated in the second place bear the following liens: lease in favor of Trujillo Mercado & Company, which was the subject of record No. 3; lease in favor of Alejandro Philip Adams, which was the subject of record No. 2; a lease mentioned in record No. 10 in favor of the partnership Mario Mercado e Hijos; and the mortgage in favor of the partnership Mario Mercado e Hijos for $41,256.89 as principal upon one-half of the estate Los Indios and another one, already mentioned, which was the subject of record No. 12, conveyed as shown by record No. 14 and the whole estate is burdened by the lease to the partnership Mario Mercado e Hijos, the subject of record No. 13. Ponce, March 9, 1937.

The Registrar: (Sgd.) Miguel Planellas."

(Internal revenue stamps worth $36.00 are affixed and cancelled.) (There is a handwritten notice which reads:

"Cancelled three $10.00 internal revenue stamps, one $5.00 internal revenue stamp and three $0.50 internal revenue stamps.) No. 5, Schedule of Fees and Political Code. Dated: *ut supra.*

(Sgd.) MIGUEL PLANELLAS."

(Stenographer's note: The fact is stated that the correlative numbers in this deed are wrong.)

On the second page on the margin of the property described under No. One. the following notice appears: "Volume 34 of

Guayanilla, back of Folio 2, Property No. 711 duplicate, Record No. 13."

On the page marked 12 and on the margin of Parcel No. One, the following notice appears: "Volume 36, Guayanilla, Folio 177, property No. 1374, Record No. 1."

On page 13 and on the margin of Parcel No. Two, the following notice appears: "Volume No. 33, Guayanilla, back of folio 204, property No. 534 triplicate, Record No. 15."

On page 14 (a), there appears on the margin of Parcel No. Four, the following notice: "Volume No. 36 of Guayanilla, back of Folio 111, estate No. 1368, Record 21."

On page 15 there appears the following notice on the margin of Parcel No. 5: "Volume No. 36 of Guayanilla, back of Folio 116, property No. 1369, Record No. 2."

The seal of the Registry of Property is duly stamped. The cover page of this deed bears the following legend:

> "TOMAS PAZ Y RUIZ. Attorney and Notary Public. Specializes in Mortgage Law. Correction of errors and defects which prevent the proper registration of instruments in the Registry of Property."

Deed No. 73. *In re:* Actual Partition of Jointly Owned Rural Estates and Other Particulars. Executed by Mrs. Elvira Olivieri Commins, Mrs. Santia Olivieri Commins and her husband Mr. Narciso Ferrer, and Mr. Jose R. Peralta, acting in his capacity as lawful attorney-in-fact of the agricultural civil partnership Mario Mercado e Hijos. August 20, 1936. In Yauco, Puerto Rico.

EXHIBIT B OF THE PLAINTIFF.

No. 40.

PARTIAL CANCELLATION OF MORTGAGE, SALE OF RURAL ESTATES AND MODIFICATION OF THE TERMS OF THE MORTGAGE.

In Mayaguez, Puerto Rico on March 9, 1937.

Before Me

Luis Lopez de Victoria attorney and notary public for Puerto Rico with my domicile and office in Yauco.

There Appear

Mrs. Elvira Olivieri Y Commins, of age, single by reason of divorce, property owner and domiciled in Mayaguez, Puerto Rico, and the spouses Mr. Manuel Francisco Lluberas Pasarell and Mrs. Hazel Kells Lluberas, of age, property owners, domiciled in Yauco, who appear on their own right and Mr. Manuel Francisco Lluberas Pasarell appears moreover as attorney-in-fact of the following parties:

Mrs. Antonia Lluberas Pasarell, of age, property owner, domiciled in New York, State of New York, United States of America, widow of Dr. Carlos G. Armstrong; Miss Rosa Elena Lluberas Pasarell, of age, property owner, single and domiciled in the City of New York, State of New York, United States of America; Mrs. Graciela Lluberas Pasarell, of age, property owner, domiciled in the City of New York, State of New York, United States of America, married to Mr. Antonio Valanti Mestre; Mrs. Celia Lluberas Pasarell, of age, property owner, domiciled in Ponce, Puerto Rico, married to Mr. Emilio Blasini Totti; and Miss Raquel Lluberas Pasarell, of age, single, property owner, domiciled in New York, State of New York, United States of America.

I Certify to my personal knowledge of the appearing parties and to the truth of their statements as to being of age, as to their civil status, as to their professions and domiciles. They assert to have, and in my opinion they have, the legal qualifications neces-

sary for the execution of the present deed, and by virtue whereof, Mrs. Elvira Olivieri Commins—

States

First:—that she owns the following personal property:—

No. One: Rural Estate:—A parcel of land containing 79.46 cuerdas, equivalent to 31 hectares, 23 ares, 8 centiares, 79 miliares, lying in the Indios barrio within the municipal district of Guayanilla, which are subdivided in the following parcels: Parcel "A" with an area of 41.26 cuerdas known by the name of Cupey of flat land planted to sugar canes; Parcel "B" containing 4 cuerdas of flat land, planted to sugar canes; Parcel "C" having 20.52 cuerdas of semiflat land at present planted to lesser crops; Parcel "D" containing 1.68 cuerdas of semiflat land planted to lesser crops; and Parcel "E" containing 12 cuerdas of semiflat land planted to lesser crops. The whole tract is bounded as follows: on the north by land of Santia Olivieri, the track of the American Railroad Company and from the west angle of Parcel "D" by the municipal road leading from Guayanilla to the Boca barrio; on the south by land of Arturo Lluberas and nephews, by the Yauco river, by a 0.30-cuerda undivided parcel containing the pump and belonging to Santia and Elvira Olivieri Commins, and with land of Santia and Elvira Olivieri Commins; on the east by land of Santia Olivieri, and on the west by land of Mariano Lugo, by land of Ramon Ramirez, and by an old road which divided land of Ramon Lluberas, Luis Cervoni, Dolores Lopez and land of Luis Cervoni and on the southwest, land of Arturo Lluberas and nephews. The fact is recorded that all along the east side there is a road belonging to Santia and Elvira Olivieri, 6 meters wide, which proceeds along the west side of Parcel "B" as far as the undivided 0.30-cuerda parcel where the irrigation pump stands. Within this tract, but enclosed by said Parcel "C" there is a small parcel of land jointly owned by Santia and Elvira Olivieri with an area of 0.25 cuerda and there is built thereon a small house with a concrete foundation for a pump. And it is hereby ex-

plained that the aforesaid parcels marked letters "E" and "D" are separated, the former, partly on its east side, by the road leading from Guayanilla to Boca barrio and the latter by the railroad track, both in connection with Parcel "C", and the former is also separated in connection with the latter by the said railroad track.

No. Two: A Portion of Parcel of Saltpeter Land lying in the Indios barrio of the municipal district of Guayanilla and bounded: on the north by land of Mario Mercado e Hijos; on the south by a cano within the land of Santia Olivieri; on the east by the Caribbean Sea and on the west by a 6-meter wide road, three meters of which is part of this parcel and the other three meters part of the parcel of land belonging to Santia Olivieri. Its area is 41.99 cuerdas, equivalent to 16 hectares, 50 ares, 37 centiares and 7 miliares of saltpeter land.

No. Three: A $50.00 undivided half interest in the following $100.00-worth parcel: Undivided parcel of land with an area of 0.30 cuerda, equivalent to 11 ares, 79 centiares and 12 miliares with a small house thereon, fenced and roofed with galvanized-iron, with a steam pump with every accessory and pipes for pumping water from the Yauco river for the irrigation of the estates belonging to Santia and Elvira Olivieri, situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north by land belonging to Elvira Olivieri Commins; on the south by the Yauco river; on the east by land belonging to Santia Olivieri Commins.

No. Four: A $50.00 undivided half interest in the following $100.00-worth parcel: Rural: an undivided parcel of land measuring 0.25 cuerda, equivalent to 9 ares, 82 centiares and 60 miliares, possibly destined to have installed thereon a pump for drawing water from adjacent springs, with a cement foundation with a small house roofed and fenced with galvanized iron and pipes. This parcel of land is situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north, west and east by Parcel "C" of the estate belonging to Elvira

Olivieri Commins; and on the south by Parcel "A" known as Cupey from the same estate of Elvira Olivieri Commins.

No. Five: Rural:—An estate known as Juanita lying in the Pueblo and Quebrada barrios of the municipal district of Guayanilla, with an area of 81.77 cuerdas of flat land applied to sugar canes and 378.91 cuerdas of wood and pasture land, and a water pump for irrigating said canes and a frame house with the galvanized-iron roof in poor condition. It is bounded on the north by land of the Heirs of Antonio Ramos, of Jesus Rodriguez, of Ricardo Rodriguez, of Dr. Jose Çobian, and of the Heirs of Lugo and a municipal road separating land partly of Mario Mercado e Hijos; on the south by land of Mario Mercado e Hijos and partly by a municipal road separating land of said concern, by land of Santia de la Cruz de Pacheco, of Catalina Tirado and of Mario Mercado e Hijos; on the east by land of the aforesaid Mario Mercado e Hijos; on the northwest by land of the Heirs of Antonio Ramos and of Joaquin Diaz; and on the west by land of Joaquin Diaz, of Herminia Morales, and the woodland of the San Rafael plantation, of the Heirs of Angela and Dario Franceschi; on the southwest by land of Mario Mercado e Hijos. This estate is crossed from south to the northwest by the tracks of the American Railroad Company of Puerto Rico. Its area is 460.68 cuerdas equivalent to 181 hectares, 6 ares and 57 centiares.

Second: Said Elvira Olivieri Commins acquired the above immovables by reason of the actual partition of rural estates as set forth in deed No. 73, executed on August 20, 1936, in Yauco, before notary Tomas Paz y Ruiz.

Liens

Third:—The only lien encumbering the above immovables is a voluntary first mortgage constituted by deed No. 30, executed in Mayaguez, before me, on February 25, 1937, the amount of such mortgage being $45,000.00 as principal and upon the terms, conditions, distribution of liability and other details set forth in the

aforesaid deed, such mortgage being executed in favor of Mr. Manuel Francisco Lluberas who appears herein.

Partial Cancellation

Fourth:—Mr. Manuel Francisco Lluberas Pasarell acknowledges that on this day and prior to the present cancellation, Mrs. Elvira Olivieri Commins has paid to him on account of the principal of the aforesaid mortgage, the sum of $40,000.00; said Manuel Francisco Lluberas Pasarell having relieved the mortgagor from the payment of interest on said $40,000.00. This payment of $40,000.00 constitutes a release of the liability encumbering the immovables described in said mortgage described under Nos, 1, 2, 3, and 4 of the first paragraph of this deed. By virtue whereof, Mr. Manuel Francisco Lluberas Pasarell, with the express consent of his wife, Mrs. Hazel Kells Lluberas, partially cancels the aforesaid mortgage as to the $40,000.00 received, the interest thereon having been waived, relieving of any lien the aforesaid immovables described under Nos. 1, 2, 3 and 4 of the first paragraph of this deed.

The mortgage is left standing as to the $5,000.00 encumbering the rural estate described under No. 5 of the first paragraph of this deed; and the terms, rate of interest on said mortgage, shall be modified hereinafter.

Sale

Fifth:—Mrs. Elvira Olivieri Commins hereby sells absolutely, free of liens and encumbrances, without any reservation, to Mr. Manuel Francisco, Dona Antonia, Dona Rosa Elena, Dona Graciela, Dona Celia and Dona Raquel Lluberas Pasarell, the immovables described under Nos. 1, 2, 3 and 4 of the first paragraph of this deed, that is, the whole of the immovable described under No. 1, the whole of the immovable described under No. 2, one undivided half interest of the immovable described under No. 3, that is, all the condominium had in said immovable by the vendor; and the undivided half interest in the immovable described under No. 4, that is, all the condominium had in said immovable by the

vendor; all of which I described in the first paragraph of this deed.

The consideration of this sale is the lump sum of $40,000.00. This sum is acknowledged to have been received by Mrs. Elvira Olivieri Commins from the purchasers, before now and to her entire satisfaction, for which sum she gives the purchasers the proper release and acquittance.

Sixth:—The purchase price is distributed among the immovables sold as follows:

$35,000.00 for immovable No. 1.

$1,000.00 for immovable No. 2.

$2,000.00 for immovable No. 3, that is, the condominium.

$2,000.00 for the condominium described under No. 4.

Seventh:—The purchasers acquire, each of them, an undivided jointly owned equal interest in the immovables and condominiums involved in this contract.

Eighth: This sale covers all the rights, uses, servitudes, interest in the irrigation pump and accessories and everything else included in said estates and rights pertaining thereto.

Regarding Possession

Ninth:—As there exists a lease in favor of Mario Mercado e Hijos as regards the estates sold, which lease expires on June 2, 1937, the purchasers herein will take actual possession of the said estates in accordance with the clauses of the said lease, which lease was constituted by deed No. 50, executed in Ponce, on April 5, 1927, before notary Francisco Parra Capo, and Mrs. Elvira Olivieri Commins will take every step so that at the expiration of such lease, delivery thereof shall take place normally; but should Mrs. Elvira Olivieri Commins meet with difficulties to take actual possession of the estates above described from their lessees, such circumstances shall be considered as *force majeure* and she will not be liable at all for any delay incurred in delivering possession without her fault or negligence.

Modification of Mortgage Terms

Tenth:—By virtue of the partial cancellation made in this deed, the mortgage constituted in deed No. 30, executed before me on February 25, 1937, has remained in force only for $5,000.00 as principal, affecting the estate described under No. 5 of the first paragraph of this deed, which estate is called Juanita. Mr. Manuel Francisco Lluberas Pasarell, with the express consent of his wife Mrs. Hazel Kells Lluberas, agrees with Mrs. Elvira Olivieri Commins to modify the terms of such mortgage, which modification is carried out under the following clauses and terms:

A.—The mortgage still subsists as regards the estate Juanita for $5,000.00.

B.—The interest on such mortgage is reduced to 6% annually, such interest to begin to accrue as from February 25, 1937, until the debt is fully and finally paid, said interest to be paid annually at the expiration of each year.

C.—Said mortgage shall be extended for five years, which counted from the 25th of February, 1937, shall expire on the 25th of February, 1942.

D.—The mortgage lien upon said estate Juanita shall subsist, not only as regards the principal, but also, as regards the interest on said principal at the stipulated rate of 6% annually, as well as for the additional sum of $200.00 for disbursements, costs and attorney's fees in case of foreclosure.

Eleventh:—Mrs. Elvira Olivieri Commins and Mr. Manuel Francisco Lluberas Pasarell state that the power of attorney executed by the former to the latter, and the resolutory conditions contained in deed No. 30, executed before me on February 25, 1937, were duly performed by Mr. Manuel Francisco Lluberas Pasarell, who effected the payment and secured the cancellation of the mortgage constituted by deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of his colleague Jose Tous Soto, which mortgage credit was subsequently conveyed to Belen Gonzalez Salicrup, widow of Tous Soto and children, as per deed No. 33 of May 9, 1933, executed

before notary Fernando Zapater Martinez, said mortgage having been effected by deed No. 47, executed in Ponce, Puerto Rico, on March 8, 1937, before notary Fernando Zapater Martinez.

Twelfth:—All the parties hereto in their respective capacities approve the present deed in every respect.

I, the notary, instructed the parties hereto regarding their rights and duties under the law and pertinent herein of which they are informed.

The parties hereto execute the present deed before the witnesses, Attorney Jose Sabater and Mr. Eduardo Muller, personally known to me, of age, domiciled in Mayaguez and without any legal impediment to act as such.

The parties hereto having been informed of their rights under the law to read this deed themselves, of which right they avail themselves, ratify its contents and sign together with the witnesses, the parties hereto having affixed their initials to the other folios of this deed, in accordance with law.

To All of Which, I, the Notary, Do Hereby Certify.

It is herein set forth by the parties: That Mrs. Elvira Olivieri Commins reserves to herself the right to effect the total payment of the mortgage on the estate Juanita or partial payments on account thereof at any time even before its maturity.

(Sgd.) ELVIRA OLIVIERI.
M. FRANCISCO LLUBERAS.
HAZEL K. LLUBERAS.
JOSE SABATER.
EDUARDO MULLER.

(Signed, signeted, sealed and paraphed):

Luis Lopez de Victoria.

There are affixed to the original and cancelled the proper internal revenue stamps.

This is a true and faithful copy of its original, which is deed No. 40, executed in Mayaguez, Puerto Rico, before me on March 9, 1937, on file in my protocol of public instruments to which I

refer. At the request of Mr. Manuel Francisco Lluberas Pasarell, I issue this copy the same day of the execution of its original, having made a note of this issuance.

(Sgd.) Luis Lopez de Victoria.

All the pages are signeted, sealed and paraphed by said notary. There are affixed thereto and cancelled internal revenue stamps worth $8.80.

(The following legend appears on the back of the last page: "Cancelled a $0.50 stamp.") A rubber stamp has been stamped reading as follows: "Presented at 2:30 P.M. for entry on folio 32 of Volume 186 of this district. Ponce, Puerto Rico, March 10, 1937.

The Registrar (Sgd.) Miguel Planellas."

(The seal of the Registry of Property is stamped.)

Further down the following handwritten statement appears:

"This instrument has been recorded only as regards the sale and the modification of the mortgage, with a description on the margin of each one of the estates referred therein. The estates described under Nos. from One to Four are encumbered by the following liens: lease in favor of Alejandro Philip y Adams which gave rise to record 2; lease in favor of Trujillo Mercado & Compania which gave rise to record 3; lease mentioned in record 10 in favor of the partnership Mario Mercado e Hijos; and lease in favor of the partnership Mario Mercado e Hijos which gave rise to record 3. Ponce, March 23, 1937.

The Registrar (Sgd.) Miguel Planellas."

There are cancelled internal revenue stamps worth $87.50

(Further down the following appears: "'Cancelled one $50.00 stamp, three $10.00, one $5.00, two $1.00 and one $0.50. No. 5 Schedule of Fees and Political Code. Dated: *ut supra.*

(Sgd.) Miguel Planellas.")

The cover page of this deed bears the following legend: "Luis Lopez de Victoria, Attorney and Notary Public. Box 114. Telephone 47. Copy of Deed No. 40. Partial Cancellation of Mortgage, Sale of Rural Estates and Modification of Mortgage Terms. Executed by Mrs. Elvira Olivieri Commins and the spouses Mr. Manuel Francisco Lluberas Pasarell and Mrs. Hazel Kells Lluberas. March 9, 1937. Mayaguez, Puerto Rico."

Note: On page 2 and on the margin of the estate described under No. One, the following note appears: "Volume 36 of Guayanilla, back of folio 179, estate No. 1374, record 2."

On page 5, on the margin of the estate described under No. Two, the following note appears: "Volume 36 of Guayanilla, folio 189, estate No. 534, quadruplicate, record 17."

On the margin of the estate described under No. Three, the following note appears: "Volume 36 of Guayanilla, back of folio 112, estate No. 1368, record 3."

On the margin of estate described under No. Four, the following note appears: "Volume 36 of Guayanilla, back of folio 117, estate No. 1369, record 3."

On the margin of the estate described under No. Five, page 7, the following note appears: "Modification. Volume 36 of Guayanilla, folio 166, estate No. 711 triplicate, record 15."

The seal of the Registry is stamped on all its pages.

EXHIBIT C OF THE PLAINTIFF.

No. 10

In the city of Ponce, Island of Puerto Rico, on the 7th day of the month of July, 1935,—

Before Me

Benigno Fernandez Garcia, Attorney and Notary public for this Island with my office in the city of San Juan,—

They Appear

Mr. Mario Mercado y Montalvo, of age, a widower, property owner and domiciled in Ponce, Puerto Rico;

The Spouses Mrs. Margarita Mercado Y Riera and Mr. Salvador S. Mandry Y Espinosa, both of age, property owners, domiciled in Ponce, Puerto Rico;

The Spouses Mr. Mario Mercado Y Riera and Mrs. Maria Luisa Parra Capo, both of age, property owners, domiciled in Ponce, Puerto Rico;

And Mr. Ramon Ramos Casellas, of age, a civil engineer and domiciled in San Juan, Puerto Rico, acting in the name and representation of Mr. Adrian Mercado Y Riera, of age, single, property owner and domiciled in Ponce, Puerto Rico, temporarily residing in the City of Rome, Italy, who has given him the power of attorney No. 141, executed in the city of Ponce, Puerto Rico, on August 23, 1926, before notary public Francisco Parra Capo, wherein he has been clothed with sufficient powers for executing the present instrument, which he will prove whenever necessary. Mr. Ramos Casellas asserts that such power has neither been revoked nor restricted in any way.

I Hereby Certify to my knowledge of the parties hereto, who assure me to possess, and in my opinion they possess, the necessary legal qualifications to execute the present deed of renewal of partnership, and to that effect state:

First:—That by deed No. 36, executed in the city of Ponce, Puerto Rico, on June 13, 1916, before notary Antonio F. Castro, Mr. Mario Mercado y Montalvo and his wife Mrs. Eufemia Riera y Dubocq, Mr. Mario Mercado y Riera and his wife Mrs. Maria Luisa Parra Capo, Mr. Salvador S. Mandry and his wife Mrs. Margarita Mercado y Riera, Mr. Germanico S. Belaval and his wife Mrs. Maria Luisa Mercado y Riera and Mr. Adrian Mercado y Riera, set up an agricultural civil partnership to trade under the name of "Mario Mercado e Hijos", with its domicile in the city of Ponce, Puerto Rico, and for the period of Five Years, to expire on June 15, 1921, which was renewed by tacit consent of all the partners for a further period of Five Years which expired on June 15, 1936.

Second:—That Mrs. Eufemia Riera y Dubocq, married to Mario

Mercado y Montalvo, died in the city of Ponce on June 22, 1919, the partnership having been continued between the surviving spouse and the other partners.

Third:—That by deed No. 99, executed in the city of Ponce, on June 11, 1926, before notary public Jose Tous Soto, Mrs. Maria Luisa Mercado y Riera, through her attorney-in-fact, that is, her spouse, Germanico S. Belaval, granted, sold and conveyed to Mr. Mario Mercado y Montalvo such rights, actions and interests to which she was entitled in her own right as partner of the partnership "Mario Mercado e Hijos", and she also sold, granted, waived and conveyed to Mr. Mario Mercado y Montalvo, by the same deed, her interest in the partnership "Mario Mercado e Hijos" which had come to her as an inheritance from her deceased mother Mrs. Eufemia Riera y Dubocq.

Fourth:—That by the above deed No. 99, executed in the city of Ponce on June 11, 1926, before notary Jose Tous Soto, Mr. Mario Mercado y Montalvo, Mr. Mario Mercado y Riera, with the express consent of his wife Mrs. Maria Luisa Parra Capo, Mrs. Margarita Mercado y Riera, with the express consent of her husband Mr. Salvador S. Mandry y Espinosa and Mr. Adrian Mercado y Riera, extended the time of the partnership "Mario Mercado e Hijos" constituted by deed No. 36, of June 13, 1916, executed before notary public Antonio F. Castro, for a further period of five years, beginning on June 15, 1926, containing the same clauses and terms stipulated in the said deed of constitution of partnership, including clause four relative to the extension of the five-year period to a further period of five years, and with the modifications set forth in said deed of extension; and that the terms of said partnership has been extended by tacit agreement of all the parties up to June 15, 1936.

Fifth:—That the partners have again agreed to extend the life of the partnership "Mario Mercado e Hijos" with the same clauses and terms set forth in the deeds of constitution of partnership and extension of partnership above mentioned which they carry out by means of the present deed with the following clauses:

First:—Mr. Mario Mercado y Montalvo, Mrs. Margarita Mercado y Riera, with the express consent of her husband, Mr. Salvador S. Mandry y Espinosa, Mr. Mario Mercado y Riera, with the express consent of his wife, Mrs. Maria Luisa Parra Capo, and Mr. Ramon Ramos Casellas, in the name and representation, as attorney-in-fact of Mr. Adrian Mercado y Riera, do hereby extend the life of the partnership "Mario Mercado e Hijos", constituted by deed executed in the city of Ponce Puerto Rico, under No. 36, on June 13, 1916, before notary public Mr. Antonio F. Castro, and renewed and modified by deed No. 99, executed in the same city of Ponce, on June 11, 1926, before notary public Jose Tous Soto, for a further period of fifty years which shall begin to be counted from June 15, 1936, to expire therefore on June 15, 1986, keeping with their full force and effect, without any change or modification, each and all of the clauses and terms set down in the deeds of partnership and extension of partnership.

The parties hereto approve this deed just as the same is drafted and, I, the notary, warn them as to their rights and duties under the law.

The parties hereto execute the present deed before the witnesses Mr. Manuel de la Pila and Mr. Hilarion Perez Guerra personally known to me, of age, domiciled in this city and without any legal impediment to act as such.

This deed has been read by me, the notary, to the parties and witnesses hereto and the same is signed by all of them without objection; and as to its contents and the personal characteristics of the parties, according to their statements, I, the notary, do hereby certify.

(Sgd.) MARIO MERCADO.
MARIO MERCADO, Jr.
MARGARITA MERCADO RIERA.
SALVADOR S. MANDRY.
MARIA L. PARRA DE MERCADO.
R. RAMOS CASELLAS.
MANUEL DE LA PILA.
H. PEREZ GUERRA.

Signeted, signed, paraphed and sealed,

B. FERNANDEZ GARCIA.

There are affixed hereto and cancelled the proper internal revenue stamps as well as my notarial seal.

It is a true and faithful copy of its original which, under the above number, is on file in my protocol of public instruments of the current year to which I refer.

At the request of the partnership "Mario Mercado e Hijos" I issue for it this copy on six sheets of paper of those used by me, typewritten on one face only, a note thereof being recorded on the original, and I signet, sign, paraph and seal the same in the city of San Juan, Puerto Rico, on this day, the 29th of July, 1935.

(Sgd.) B. Fernandez Garcia.

Signeted, sealed and paraphed by B. Fernandez Garcia.

There is affixed hereto a $0.50 internal revenue stamp duly cancelled, as well as the notarial seal of the undersigned notary on every page with his paraph.

The cover bears the following legend:

"B. Fernandez Garcia—Attorney and Notary Public—No. 10—Deed of Renewal of Partnership—Executed—Mr. Mario Mercado Montalvo; The Spouses Mr. Mario Mercado Y Riera and Mrs. Maria Luisa Parra Capo; The Spouses Mrs. Margarita Mercado Y Riera and Mr. Salvador S. Mandry, and Mr. Ramon Ramos Casellas, as attorney-in-fact of Mr. Adrian Mercado Y Riera. July 7, 1935. Ponce, Puerto Rico.

EXHIBIT D OF THE PLAINTIFF:

Pedro M. Porrata—Attorney and Notary Public—Box 1224—Telephone 859—Ponce, P. R.

January 9, 1938.

Hon. Registrar of Property of Ponce, Ponce, Puerto Rico.

Dear Sir:—

In behalf of the partnership Mario Mercado e Hijos I apply to

you as the registrar of property of this district for a certified literal copy of the entry of deed No. 13, of March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, which is a mortgage deed constituted by Mrs. Elvira Olivieri Commins in favor of Mr. Mario Mercado Montalvo upon the estate Indios of Guayanilla.

Said deed appears of record on the back of folio 152 of Volume 33 of Guayanilla.

Yours truly,

(Sgd.) PEDRO M. PORRATA.

PMP:asc

R. 540. Aug. 2, 1935—10,000. Department of Justice of Puerto Rico—Registry of Property—Ponce, Puerto Rico.

Miguel Planellas Yanez, Registrar of Property of Ponce, Puerto Rico, and its Mortgage District, Do Hereby Certify:

1.—That record No. 12 (a), of estate 534, duplicate, entered on the back of folio 152 of Volume 33 of Guayanilla referred to in the foregoing application, literally copied, reads as follows:

12 (a).—Rural: Described in the foregoing record tenth the same as in the instrument. This estate is encumbered by a lease in favor of Mr. Alejandro Philips Adams, which matured on June 1, 1912, which gave rise to the previous second record; by a lease in favor of Trujillo Mercado & Company, which matured on June 2, 1922 and gave rise to record 3; by a lease in favor of Mario Mercado e Hijos, mentioned in the preceding record tenth. The interest therein belonging to Mrs. Santia Olivieri Commins is encumbered by a mortgage in favor of Mario Mercado e Hijos, conveyed to Eufrosina Cianchini which gave rise to record tenth and eleventh. Mrs. Elvira Olivieri Commins, of age, single by reason of divorce, property owner, domiciled in Yauco, acquired by inheritance an undivided half interest in this estate, as appears from record four. By deed No. 13, executed in Mayaguez, Puerto Rico, on March 23, 1932, before notary public Fernando Zapater Martinez, Mrs. Elvira Olivieri Commins acknowledges to

be indebted to the partnership Mario Mercado e Hijos in the sum of $41,256.89, by reason of a current account with liquidated interests until March 23, 1932, and in payment of the aforesaid sum owed by her to the said partnership Mario Mercado e Hijos, she executed, granted and delivered to said partnership, through its attorney-in-fact, Mr. Arturo Cortes Valls, of age, married, an employee and domiciled in Guayanilla, four promissory notes payable to bearer by indorsements, to become due all of them on March 23, 1939, and subscribed by said lady for the following sums: No. One, for $10,000 as principal, plus $2,700 for interest thereon and $500 for costs; No. Two, for $10,000.00 as principal, plus $2,700 for interest and $500.00 for costs; No. Three, for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; and No. Four, for $11,256.89 as principal, plus $3,000.00 for interest and $500.00 for costs. Said Mrs. Elvira Olivieri Commins constitutes a voluntary mortgage on her condominium in this estate, which is mentioned on the margin, as security for all and each of the aforesaid promissory notes, which mortgage will secure, in addition to the principal of the aforesaid notes, the sum of $11,100.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery and demandable, as a penalty, should the above happen, without the necessity of a liquidation. Mrs. Elvira Olivieri Commins and Mr. Arturo Cortes Valls, in behalf of the partnership Mario Mercado e Hijos, appraise, with a waiver of any new assessment or action for that purpose, the mortgaged condominiums as follows: the condominium affecting this estate at $50,000.00; and the condominium of the estates on the margin at $25,000.00. Mrs. Elvira Olivieri Commins agrees with the partnership Mario Mercado e Hijos that out of the rentals to which she is entitled, under the contract of lease referred to at the end of the item of liens in this entry, *viz.*, the sum of $4,100.00, said partnership will retain, to be applied to the payment of the accrued interest, the sum required to cover the same, said retention to begin on June 2, 1932, and so on every time the same becomes

due, that is, on March 4 and June 2 of each year. It is stipulated that should three instalments of interest become due and left unpaid, the mortgagor shall forfeit the right to avail herself of the term agreed upon for the payment of the principal and the mortgagee may proceed to the judicial recovery of all or anyone of the promissory notes, either by summary proceedings or by means of an ordinary action. If, at the expiration of the contract of lease above referred to, said promissory notes should not have been paid, the mortgagor, her assigns or successors in interest, bind themselves to impose upon any lessee the obligation to retain from any rentals agreed upon, the sums required for the payment of the interest due to Mario Mercado e Hijos and to effect such payment to said partnership, for the account of the mortgagor, as stipulated in clause 4 of the deed referred to. Notwithstanding the stipulation contained in the foregoing clause, the mortgagor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit hereby constituted is not paid, to grant it priority for the purchase or lease of her condominiums in the estate recorded under this number and which is mentioned on the margin thereof. For this purpose the mortgagor shall advise, so long as the mortgage credit is not satisfied, by registered letter to Mario Mercado e Hijos, of any proposal to purchase or lease that might be made and said partnership shall be allowed a period of thirty days for accepting or refusing such proposal and during that time the mortgagor shall not sell or lease to anybody else. In the event of sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to enforce its right of redemption against the purchaser or lessee, which right it may exercise within thirty days from the record of the sale or lease in order to subrogate itself to the place, degree and priority of the purchaser or lessee. Mrs. Elvira Olivieri Commins states that no homestead right has been constituted upon any of the mortgaged estates, but if in the future any such right in her favor should be constituted, she waives such right from now on and for all time in favor of

the partnership Mario Mercado e Hijos, its assigns, successors in interest, in consideration of the present contract during the life thereof. The parties agree that the mortgagor may pay at any time before maturity the obligation herein constituted or to pay it on account thereof any sum of money not below $5,000.00, provided, notice is served on the mortgagee three months prior to the date when she intends to pay the principal of such mortgage, or a partial payment on account. The parties, likewise, expressly set forth that the lessor has been paid all the rentals pertaining to the estates accrued up to the date of the deed to which I refer, and that, upon the execution thereof, she was paid by means of a check, the sum of $1,500.00 upon the Banco de Ponce, in payment of the annual instalment which became due on the month of March, *ultimo*. The parties, likewise, agree that the actual partition of such estates shall not be carried out without the consent of Mario Mercado e Hijos as long as the mortgage constituted by the deed to which I refer remains in force. For the purpose of the registry, the mortgage lien is distributed in such a way that the condominium in this estate shall be liable for the sum of $28,877.81 as principal, plus $1,400.00 for costs, expenses and attorney's fees, besides $7,770.00 for interest. By virtue whereof, the agricultural civil partnership, Mario Mercado e Hijos, domiciled in Guayanilla, constituted by deed No. 36, dated June 13, 1916, and executed before notary Antonio F. Castro, and modified and extended by deed No. 99, of June 11, 1926, executed before notary Jose Tous Soto, registers its mortgage lien upon the undivided half interest in this estate of Elvira Olivieri Commins. The aforesaid appears from the registry and from the aforementioned mortgage deed, a first copy of which was presented in this office at 3:30 P.M., on the 4th of the current month of August according to entry No. 59 of Volume 160 of the daybook. It is set down that the said mortgage lien is recorded in favor of the partnership Maria Mercado e Hijos, or of the holder or holders by indorsement of the said notice. The deeds of constitution and extension of partnership and the power of attorney No. 39, exe-

cuted before Jose Tous Soto on February 16, 1927, evidencing the capacity in which Arturo Cortes Valls is acting, are described in the eleventh record of this estate. The fact is noted that in checking this entry it is noticed that they failed to state that the principal on said promissory notes shall draw interest at 9% annually until fully paid and payable semi-annually at the end of each semester. As the foregoing tallies with the registry and the instrument presented, I sign this paper in Ponce, on August 12, 1932. Fees $24.00, No. 5 Schedule of Fees.

(Sgd.) MIGUEL PLANELLAS."

There are two notices on the margin reading as follows: "The other estate is the one recorded on the back of folio 22 of Volume 16 of Guayanilla, Estate No. 711, Tenth record, Ponce, August 12, 1932. Planellas.". There is another notice reading as follows: "The mortgage which gave rise to the interested record twelfth has been conveyed according to the subsequent record fourteenth. Ponce, May 16, 1933."

2. The record of said mortgage upon the other estate referred to in the first marginal note, and which was made on the back of folio 22 of Volume 16 of Guayanilla, Estate No. 711, literally transcribed reads as follows:

> "10th. Rural: called Juanita, lying in the Pueblo and Quebrada barrios of the municipal district of Guayanilla, whose description appears in the first record as well as in the instrument presented. There are no liens on it. And on the first record it is set down that there is constituted in favor of one of the parcels making up the parcel under this number a servitude of right of way. Mrs. Elvira Olivieri Commins, single on account of divorce and Mrs. Santia Olivieri Commins, married to Mr. Narciso Ferrer y Sardo, all of them of age, property owners and domiciled in Yauco, acquired the estate under this number as shown by records first, sixth and seventh, because although it is true that subsequently this estate was actually partitioned as stated in the foregoing

record ninth, such partition was cancelled according to the deed which gave rise to the note on the margin of that record. In the instrument the subject-matter of this entry, Mrs. Elvira Olivieri Commins, assuming the ownership of the undivided half interest therein, acknowledges to owe the partnership Mario Mercado e Hijos the sum of $41,256.89, arising from a current account with liquidated interest up to March 23, 1932, and in payment thereof she issued, executed and delivered to the partnership Mario Mercado e Hijos, represented in such execution by its attorney-in-fact, Arturo Cortes Valls, four promissory notes in favor of the holder by indorsement, to mature all of them on March 23, 1939, for the following amounts: Note No. 1 for $10,000.00 as principal plus $2,700.00 for interest and $500.00 for costs; Note No. 2 for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; Note No. 3 for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs, and Note No. 4 for $11,256.89 as principal, plus $3,000.00 for interest and $500.00 for costs, the principal of each of the aforesaid notes to bear interest at 9% annually, payable in semi-annually installments at the end of each semester. Said Mrs. Elvira Olivieri Commins constitutes a voluntary mortgage upon her condominiums in this estate, which mortgage is referred to on the margin, a security for all and each of the aforesaid notes, which mortgage shall secure, besides the principal of the aforesaid notes, $11,000.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery as appears from deed No. 13, executed in Mayaguez on March 23, 1932, before notary of Ponce, Fernando Zapater Martinez, which has been recited at length in the twelfth record of estate No. 534 duplicate, on the back of folio 152 of Volume 33 of Guayanilla. The aforesaid condominium in this estate, which has been appraised at $25,000.00, shall secure $12,379.08 as principal, $3,330.00 as interest thereon and $600.00 for costs.

By virtue whereof, the agricultural civil partnership Mario Mercado e Hijos or the holder or holders of the aforesaid promissory notes record their mortgage right upon the condominium held by Elvira Olivieri in this estate. Ponce, August 12, 1932. Fees $15.00, No. 5 of the Schedule of Fees.

(Sgd.) Planellas."

There is a note on the margin reading as follows: "The other estate is Estate No. 534 duplicate, on the back of folio 152 of Volume 33 of Guayanilla. Ponce, August 12, 1932. Planellas."

3.—That no further particulars are certified to because it is not so requested by the interested party and in order to record such fact and at the request of attorney Pedro M. Porrata, attorney for Mario Mercado e Hijos, I issue this certificate in Ponce, Puerto Rico, on January 13, 1938.

(Sgd.) MIGUEL PLANELLAS.

(Miguel Planellas Yanez, Registrar of Property of Ponce, Puerto Rico.)

There have been affixed hereto and cancelled one $3.00, one $1.00 and two ten-cent internal revenue stamps. The following handwritten notice also appears: "There have been affixed hereto and cancelled one $3.00, one $1.00 and two ten-cent internal revenue stamps. No. 6 of the Schedule of Fees. Ponce, Puerto Rico, January 13, 1938.

(Sgd.) Miguel Planellas."

There is a cover page with the following legend: "R. 167. July 10, 1935—2,000. Department of Justice of Puerto Rico. Registry of Property. Ponce, P. R. Certificate relating to Estates Nos. 534, 711, recorded on the back of folios 152, 22, of Volumes of Guayanilla Nos. 33 and 16, respectively. This certificate is issued on January 13, 1938, at the request of attorney Pedro M. Porrata.

EXHIBIT E OF THE PLAINTIFF.

Fernando Zapater Martinez, Attorney and Notary. Ponce, Puerto Rico.

RATIFICATION

No. 72

In Ponce, Island of Puerto Rico, March 31, 1937.

Before Me

Fernando Zapater y Martinez, attorney and notary public for this Island, with my domicile, place of residence and office in said city.

There Appear

Dona Luz Belen, Dona Alicia, Dona Celia, Dona Belen Maria, Dona Gladys and Don Jorge Tous Gonzalez, all of them of age, property owners, domiciled in Ponce, the first two married and the others single.

Mrs. Belen Gonzalez Salicrup widow of Tous, of age, property owner and domiciled in Ponce, appears herein in her own behalf and moreover as mother with *patria potestas* over her minor son Hector Tous Gonzalez, 17 years old, single, property owner and a resident of Ponce; as the guardian of Mr. Jose Tous Gonzalez, incapacitated, of age, single, property owner and casually residing in San Juan, Puerto Rico, and besides, as the attorney-in-fact of Mrs. Ana Rosa Tous Gonzalez, of age, married to Mr. Jose B. Carrion, property owner and domiciled in Humacao, Puerto Rico.

I certify to my personal knowledge of the parties hereto and to their personal characteristics as stated by them. They assure me that they are in the full enjoyment and exercise of their civil rights and being in my opinion sufficiently qualified for the execution of this instrument they freely set forth the following facts.

First:—That by public deed No. 33, executed before notary Fernando Zapater Martinez, on May 9, 1933, recorded in Volume 16 of Guayanilla, on the back of folio 24, Estate No. 711, Twelfth Record and in Volume 33 of Guayanilla, on folio 201, Estate No.

534 triplicate, Fourteenth Record, Mr. Mario Mercado Montalvo, in his capacity as managing partner of the agricultural civil partnership, domiciled in Guayanilla, Puerto Rico, trading as Mario Mercado e Hijos, and also in his own behalf, granted to the parties hereto a mortgage credit constituted by public deed No. 13, executed in Mayaguez, Puerto Rico, on March 23, 1932, before the undersigned notary, acting in the place of Jose Tous Soto, by Mrs. Elvira Olivieri Commins upon a one-half joint interest in the following immovables:

Number One:—A piece of rural property known as Juanita lying in the Pueblo and Quebrada barrios within the judicial district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the Rufina plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said Rufina plantation; on the west by land of the San Rafael plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to Piedras Blancas barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

Number Two:—A piece of rural property known as Los Indios lying in the Indios barrio within the municipal district of Guayanilla with an area of 430 cuerdas equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio of Guayanilla, by land of the sugar cane

plantation owned by Trujillo & Mercado, now Mario Mercado e Hijos, on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Company and by mangroves of the maritime zone; on the south by the Yauco river and by land of the Mercedes plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

Second:—That the aforesaid mortgage was constituted to secure four promissory notes in favor of the holder by indorsement, all of them to mature on March 23, 1939, and subscribed by said Mrs. Elvira Olivieri Commins for the following amounts: Note No. 1 for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; Note No. 2 for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; Note No. 3 for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs, and Note 4 for $11,256.89 as principal, plus $3,000.00 for interest and $500.00 for costs, such mortgage to secure, besides the principal of the aforesaid notes, the sum of $11,100.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery, which notes were made by virtue of the aforesaid deed of "Conveyance of Credit", duly endorsed to the Heirs of Jose Tous Soto, that is, the parties appearing hereto.

Third:—That in the aforesaid deed *In re:* "Constitution of Mortgage", executed before the undersigned notary acting in the place of Jose Tous Soto by Mrs. Elvira Olivieri Commins on March 23, 1932, under No. 13, it is set down as follows:

"Seventh:—Option to Purchase and Sell and to Lease:—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall

advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

Fourth:—It is set down by the parties hereto in their respective rights and representations, that the conveyance of the mortgage credit constituted by Mrs. Elvira Olivieri Commins by means of deed No. 13, of March 23, 1932, executed before the undersigned notary, acting in the place of Jose Tous Soto, had for its exclusive aim the reception by the Heirs of Jose Tous Soto, parties hereto, of a fixed and certain rent, it being agreed that the said partnership Mario Mercado e Hijos would retain three-fourths of 1% of the interest agreed upon in the said deed of constitution of mortgage.

It was likewise agreed between the parties, in consideration of the solidary obligation assumed by the partnership Mario Mercado e Hijos that such conveyance would not carry with it, and did not so carry, the right or rights constituted in favor of the said partnership Mario Mercado e Hijos in Clause Seventh above transcribed of said deed of constitution of mortgage, said partnership reserving to itself, as it did reserve, the rights and obligations arising from said clause during all the time that the said mortgage might be in force.

It is so stated and agreed upon, and in my presence and in the presence of the witnesses, without any legal impediment, residents of this district and known to me, Mr. Antonio Quinones and Mr. Francisco R. Arevalo.

The present deed has been read by the parties hereto and the witnesses, availing themselves of the right which I warned them

they had, the former ratified its contents and both parties and witnesses signed before me, the notary, who certify to everything stated in this public instrument. I certify to the fact that all the legal requisites of the Notarial Law as finally amended have been complied with.

(Sgd.) LUZ B. TOUS DE USERA.
JORGE TOUS GONZALEZ.
BELEN MARIA TOUS.
MARIA CELIA TOUS.
GLADYS TOUS.
BELEN G. VDA. DE TOUS SOTO.
ALICIA TOUS DE MALDONADO.
ANTONIO QUINONES.
F. R. AREVALO.

There are affixed hereto and cancelled the proper internal revenue stamps. (Initials) L.B.T.U.—J.T.G.—B.M.T.—M.C.T.—G.T.G.—B.G.T.—A.T.G.

Marginal note: On the very day, month and year of its execution I issue copies of this deed in favor of Mrs. Belen G. widow of Tous. I attest.

(Sgd.) Fdo. F. Zapater,
Notary Public.

It is a true and faithful copy of its original on file in the protocol of the corresponding year in this notarial office. By virtue whereof and at the request of the partnership Mario Mercado e Hijos, I issue the present copy which is signed, signeted, paraphed and sealed in Ponce, Puerto Rico, January 14, 1938.

(Sgd.) F. Zapater Martinez.

The initials and paraph of said notary are affixed to all the pages as well as the notarial seal, and there is affixed hereto and cancelled a $0.50 internal revenue stamp.

(The cover page has the following legend: "Attorney Fernando Zapater Martinez—Attorney and Notary Public—No. 72—Deed

of Ratification. Executed by Mrs. Belen G. widow of Tous et als. March 31, 1937. Ponce, Puerto Rico.

EXHIBIT F OF THE PLAINTIFF.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez Salicrup widow of Tous, as mother with *patria potestas* over her minor son Hector Tous Gonzalez and guardian of Jose Tous Gonzalez, incapacitated, petitioner, Ex-parte. Civil Case No. 299. *In re:* Ratification of Deed.

PETITION

Now comes before the Honorable Court, Belen Gonzalez Salicrup, petitioner, through her undersigned attorney and respectfully states:

1.—That petitioner is over 21 years of age, property owner, domiciled in Ponce, a widow and mother with *patria potestas* of her minor son Hector Tous Gonzalez, single, a resident of Ponce, 17 years old and guardian of Jose Tous Gonzalez, incapacitated, over 21 years of age, property owner, a casual resident of the city of San Juan, Puerto Rico, which office petitioner accepted and took the oath of before this Honorable Court as appears from the Book of Guardianships.

That this Honorable Court in Civil Case No. 7850, *In re* Necessity and Utility, authorized the petitioner, as mother with *patria potestas* over the children who were minors at the time, Belen Maria, Gladys and Jorge, and Hector Tous Gonzalez, still a minor, and as guardian of Jose Tous Gonzalez, incapacitated, to receive, by conveyance, from the partnership Mario Mercado e Hijos a mortgage credit constituted by Mrs. Elvira Olivieri Commins, by public deed No. 13, dated March 23, 1932, executed in Mayaguez, Puerto Rico, before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, upon the estates hereinafter described, there being to this effect executed deed No. 33 dated May 9, 1933, before the said notary Fernando

Zapater Martinez, *In re:* "Conveyance of the above mortgage credit".

The estates involved in the mortgage credit are described as follows:

A joint half interest in the following real properties:

"Number One:—A piece of rural property known as 'Juanita' lying in the 'Pueblo and Quebrada' barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the 'Rufina' plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said 'Rufina' plantation; on the west by land of the 'San Rafael' plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (sic) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to 'Piedras Blancas' barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Number Two:—A piece of rural property known as 'Los Indios' lying in the Indios barrio within the municipal district of Guayanilla with an area of 430 cuerdas equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by

Trujillo & Mercado, now 'Mario Mercado e Hijos', and by land of the Heirs of Juan Irizarry, on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by 'Mario Mercado e Hijos' and formerly by 'Trujillo Mercado & Company' and by mangroves of the maritime zone; on the south by the Yauco river and by land of the 'Mercedes' plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez."

Respectively recorded in Volume 16 of Guayanilla, back of folio 24, Estate No. 711, Twelfth Record, and in Volume 33 of Guayanilla, folio 201, Estate No. 534 triplicate, Fourteenth Record.

3.—That the said deed, *In re:* Conveyance of Mortgage Credit was executed exclusively so that the Heirs of Jose Tous Soto should have a fixed and certain rent, it being agreed that the said partnership Mario Mercado e Hijos should retain 3/4 of 1% of the interest stipulated in the said mortgage deed and as said partnership assumed the obligation to pay the interest for the conveyed mortgage at the rate of 8 1/4%, Mario Mercado Montalvo individually, and the said partnership, constituting themselves solidary sureties, both of the principal of the mortgage conveyed and of the interest thereon for the time elapsed from the execution of said conveyance to the full payment of principal and interest, excluding therefore the right or rights set down in favor of the said partnership Mario Mercado e Hijos from the seventh clause of the said deed of Constitution of Mortgage, said partnership reserving to itself the rights and obligations arising from said clause during all the time of the life of the said mortgage, said seventh clause literally transcribed reading as follows:

"Seventh:—Option to Purchase and Sell and to Lease:—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit

herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

4.—That in order to ratify the above particulars, Mrs. Belen Gonzalez Salicrup in her own behalf and in the capacity in which she appears in this petition, and together with the other heirs of legal age of Jose Tous Soto, executed deed No. 72, dated March 31, 1937, before notary Fernando Zapater Martinez, a copy of which is attached to and is made part of this petition.

By Virtue of the Foregoing we pray this Honorable Court to ratify the steps taken by petitioner, Mrs. Belen Gonzalez, widow of Tous, as mother with *patria potestas* over her minor son, Hector Tous Gonzalez, and as the guardian of Jose Tous Gonzalez, incapacitated, for all legal purposes.

Ponce, Puerto Rico, April 2, 1937.

(Sgd.) F. ZAPATER,
Attorney for petitioner.

I, Fernando Zapater Martinez, do solemnly swear:—That I am the attorney for petitioner in the instant case; that I have drafted and read the foregoing petition and that the facts therein stated are true and I know them from personal knowledge. That I make this declaration in the place of the petitioner herself because

she is absent and away from this judicial district of Ponce in the city of San Juan.

(Sgd.) F. Zapater.

Sworn to and subscribed before me by Mr. Fernando Zapater Martinez, of age, an attorney, domiciled in Ponce, Puerto Rico, whom I swear to know personally in Ponce, Puerto Rico, on this the 3rd day of April, 1937.

(Sgd.) Raul Matos,
Notary Public.

Affidavit No. 82. I have been served with copy thereof on this the 3rd day of April, 1937.

(Sgd.) Pedro Rodriguez Serra,
Assistant District Attorney for the District.

(There have been affixed hereto and cancelled one $5.00 and one $0.25 internal revenue stamps and the Bar Association stamp.).

There is at the top a note reading as follows: "Filed April 6/37. E.G.P. Rec. 301 o/c."

In the District Court for the Judicial District of Ponce, P.R.—
Belen G. widow of Tous, et al. Ex-Parte. Civil Case No. 299.
In re: Ratification of Deed.

The instant case having been tried and the oral and documentary evidence for the petitioner having been heard, the court ordered a transcript to be made of the stenographic notes and that the same be forwarded to the district attorney for a written report, after which, a decision will be entered. (From the Minutes Book No. 31, First Section, sitting of April 6, 1937, presided by Hon. Judge Sepulveda.)

I Attest: (Sgd.) E. GOTAY PURCELL, Clerk.
/cs.

In the District Court for the Judicial District of Ponce, P.R.—
Belen Gonzalez Salicrup, Widow of Tous, as Mother with

Patria Potestas Over her Minor Son Hector Tous Gonzalez, and Guardian of Jose Tous Gonzalez, Incapacitated, Petitioner. Ex parte.—Civil Case No. 299. *In re:*—Ratification of Deed.

STENOGRAPHIC RECORD.

On April 6, 1937, this case was called for the hearing of evidence, the court presided by Hon. Domingo Sepulveda, Judge thereof. The petitioner was represented by her counsel, Attorney Fernando Zapater Martinez.

(Attorney Zapater Martinez is sworn.)

EVIDENCE FOR PETITIONER

Affidavit of Attorney FERNANDO ZAPATER MARTINEZ.

Witness:

My name is Fernando Zapater, I am an attorney domiciled in Ponce; I am the attorney for the Heirs of Jose Tous Soto; Mrs. Belen Gonzalez, widow of Tous is mother, with *patria potestas*, of the minor Hector Tous Gonzalez and guardian of Jose Tous Gonzalez, incapacitated. Some days ago this Court authorized Mrs. Gonzalez, the widow of Tous, to execute a deed cancelling the mortgage credit which had been conveyed to the Heirs of Jose Tous Soto by the partnership Mario Mercado e Hijos for $41,256.89. When the above mortgage credit was constituted, a clause was inserted in which the mortgagee, Mrs. Elvira Olivieri Commins and the partnership Mario Mercado e Hijos, set forth that if during the life of such mortgage such estates thereof were sold or leased, the partnership Mario Mercado e Hijos reserved to itself the right to repurchase said estates, if sold, or to get the lease, if a lease was granted, within thirty days after been served with notice of such sale or lease. In the deed conveying the said mortgage credit it was stipulated that the Heirs of Jose Tous Soto acquired the principal of the mortgage credit plus accrued interest only at the rate of 8-1/4% annually, the partnership Mario Mercado e Hijos reserving to itself 3/4 of 1%, as a consideration for the fact that the partnership Mario Mercado e

Hijos and its managing partner Mr. Mario Mercado Montalvo solidarily guaranteed to the Heirs of Tous Soto, not only the principal, but the interest as well on such credit until the same should be fully paid. After the deed of cancellation was executed, it is alleged by the partnership Mario Mercado e Hijos, that since on making the deal . . . I wish to explain to the Court that this deal was made as an act of liberality on the part of Mario Mercado e Hijos, inasmuch as upon the death of Jose Tous Soto, his family found themselves in possession of forty-one thousand and odd dollars which they could not invest, and in consideration of the friendship which always existed between Mr. Mario Mercado and Mr. Jose Tous, Mr. Mario Mercado agreed in behalf of the partnership to let the heirs acquire such mortgage credit in order to have an income. Upon Mario Mercado e Hijos becoming aware that the cancellation in question had been made and inasmuch as Mario Mercado e Hijos legally retained an interest in the mortgage credit to which I have been referring, it applies to the Heirs of Tous Soto to explain the fact, which we are now explaining: That as regards the mortgage credit there was only conveyed the principal and the interest thereon, but since the partnership Mario Mercado e Hijos remained liable for the payment of the principal and interest thereon, the right to take by purchase or lease was reserved to itself by Mario Mercado e Hijos, that the Heirs of Tous Soto were not interested in such right, as is acknowledged by all the heirs of legal age and by Mrs. Belen Gonzalez, widow of Tous, in her own right and as guardian and mother, with *patria potestas*, of the minor and incapacitated children above mentioned. This is set down in the public deed before us, which is deed No. 72, dated March 31, 1937, executed before notary Fernando Zapater Martinez. Of course, it is for the benefit of the minor and incapacitated Tous Gonzalez that this Honorable Court should approve this ratification or explanation, rather, because it might happen that the Heirs of Mario Mercado e Hijos might sue such minors to compel them to execute such deed or in order to recall such fact in

some way. As actually no harm to them will result because they received their principal and interest and really they never had any interest in such right of conventional redemption, they did recall such fact, and as minors are involved, the Court should ratify such statements embodied in a public deed.

Judge: The situation which I want to be explained is this: What is intended by that deed?

It was set down as follows . . .

But . . .

There appeared the widow of Tous Soto and the heirs of legal age, that is, Mrs. Luz Belen Tous de Usera, Mrs. Alicia Tous de Maldonado and Miss Celia Tous Gonzalez, Mr. Jorge Tous Gonzalez, Miss Gladys Tous Gonzalez and they set down in the deed the fact that when they acquired that mortgage credit they only acquired the principal and the interest thereon but they never had any interest in, nor did they acquire the right to exercise the redemption in case of sale or of lease.

What is intended to be explained by the deed?

To explain what was done verbally, to set it down in the deed: That when the Heirs of Tous Soto acquired that mortgage credit, the principal and interest thereon, they were not interested, nor were they ever interested, in repurchasing that estate if the same was sold by the mortgagee, or the lease right, inasmuch as such right belongs to Mario Mercado e Hijos. That if those estates were sold or leased while the mortgage was in force, the partnership Mario Mercado e Hijos should be entitled to purchase or lease under the same terms.

Judge: The mortgage credit?

The mortgage credit has been now satisfied.

And what is intended to be explained by that deed?

It is set down that the Heirs of Tous Soto had no interest in acquiring the right of redemption or the right to lease.

Who owns the mortgage credit now?

Nobody because it was cancelled pursuant to the authorization from this Court.

Was it cancelled?

It was cancelled.

But what is the object of the explanation?

The explanation is made because although there is a contract of lease in force in favor of Mario Mercado e Hijos, it is feared; or believed that the owners of the estates might sell to somebody else and thus cheat Mario Mercado e Hijos of its right to repurchase or lease the estates.

Judge: Where did such right arise from?

It arose from the deed of execution of the mortgage credit; when Mrs. Elvira Olivieri executed the mortgage in favor of Mr. Mario Mercado it was stipulated, as a consideration for the mortgage, that in the event that the estate were sold or leased while the mortgage was alive, the partnership Mario Mercado e Hijos would be entitled to repurchase within one month after been advised of such sale or lease, under the same terms granted to any purchaser. I want to explain that this clause was inserted inasmuch as these estates are leased to Mario Mercado e Hijos until June 30 of this year; I mean to say that until the 30th of June . . .

Who owned those estates?

Mrs. Elvira Olivieri Commins.

And Mrs. Elvira Olivieri Commins . . .

She executed a mortgage in favor of Mario Mercado e Hijos for the sum of $41,000.00.

What happened afterwards?

Then Mario Mercado e Hijos, in order to let the Heirs of Tous Soto have an income, it conveyed that mortgage to them.

Judge: Was it sold to them?

It was.

For that sum?

Yes, sir. It bore interest at the rate of 8-1/4%, inasmuch as Mario Mercado . . . The mortgage was executed at 9% originally and Mario Mercado conveyed it to the Heirs of Tous Soto bearing interest at the rate of 8-1/4% and the 3/4% was reserved to itself by Mario Mercado e Hijos, because said firm was responsible for any sum that might not be received by the Heirs either regarding principal or interest.

Subsequently, how did the mortgage credit continue?

Subsequently, the mortgagee proposed to the Heirs of Jose Tous Soto to cancel the mortgage credit by paying the principal and three-month interest.

That is so.

Indeed, as to the said minor, *viz.*, Hector Tous Gonzalez, and Jose Tous Gonzalez, incapacitated, a petition was filed in this Court which authorized Mrs. Belen Gonzalez, in behalf of the minor and of the incapacitated one, to cancel the mortgage.

Judge: Did she receive the money?

And the share belonging to the minor and incapacitated one was deposited in court, and on Mario Mercado e Hijos hearing of this and inasmuch as Mario Mercado e Hijos held a 3/4% interest on the mortgage and inasmuch as when the mortgage was executed, Mario Mercado e Hijos reserved to itself the aforementioned right to purchase and lease, Mrs. Belen Gonzalez did not object to having it set down in the deed.

Is that the deed you have in your hands?

Yes, sir. And that is the deed which we wish to submit for ratification by the court in the steps taken by the guardian and mother with *patria potestas*, Mrs. Tous.

And such condition was to last as long as the mortgage?

Yes, sir.

And after the cancellation of the mortgage?

So long as the mortgage was in force. The question is

that such is the condition; but the Court should not lose sight of the fact that Mario Mercado e Hijos reserved to itself part of the interest.

Judge: Yes, all right.

That is a question arising from the clause itself that as the mortgage was cancelled may be the mortgage credit was cancelled, but that point is not in issue, the Heirs are not interested in that. That is an issue between Mario Mercado e Hijos and Mrs. Elvira Olivieri Commins.

What is the purpose of executing the deed?

In case a sale or lease to somebody else appears. The partnership Mario Mercado e Hijos, which candidly advanced its money, wants the fact recorded by Mrs. Belen Gonzalez and the Heirs of Jose Tous Soto that they have no interest in claiming either the estates or the lease thereof. If any right accrues in favor of Mario Mercado e Hijos it will be incumbent upon them to exercise the same.

Now I understand.

Attorney: We are going to submit in evidence copy of deed No. 72, dated March 31, 1937, executed before notary Fernando Zapater, duly certified.

Judge: Admission granted.

Witness: Then, if it is for the benefit of Mario Mercado e Hijos, or if a suit was brought, it will be up to them to discuss it.

Judge: Here mention is made of two minors: Hector Tous Gonzalez . . . Is this person present?

Hector Tous Gonzalez is a minor. He is incapacitated but as he has not become of age we have not had him declared incapacitated.

Is he . . .

He is fourteen years of age; fourteen or thirteen.

Seventeen is stated here.

That is his age.

Why is he not present in court?

Because he is incapacitated . . . He is in Dr. Julia's Clinic, in San Juan.

Now mention is made of another: Jose.

Jose Tous Gonzalez . . . He has been declared incapacitated by this Court and is in Dr. Julia's Clinic.

Is this why he is not present?

Yes, sir. That is why they are not present.

Attorney: That is all.

Judge: The transcript of the stenographic notes are ordered to be attached to the record and to be handed to the district attorney for a written report.

I, Jose Cruz Montero, stenographer-reporter of the District Court for the Judicial District of Ponce, Puerto Rico, Do Hereby Certify.

That the foregoing is a true and faithful transcript of the stenographic notes taken down by me during the hearing of Civil Case No. 299, Belen Gonzalez Salicrup, widow of Tous, as mother, with *patria potestas,* of the minor Hector Tous Gonzalez, and guardian of the incapacitated, Jose Tous Gonzalez, petitioner, *In re:* Ratification of Deed; and I further certify that said stenographic notes were truly and faithfully taken and truly and faithfully represent the statements made during the hearing already mentioned.

And pursuant to an order of the Court to be attached to the record in the aforesaid case, I issue this certificate in Ponce, Puerto Rico, on this the 7th day of April, 1937, for all legal purposes.

(Sgd.) JOSE CRUZ MONTERO,
Stenographer-reporter of the District Court for the Judicial District of Ponce, P. R.

In the District Court for the Judicial District of Ponce, P. R.
Belen Gonzalez Salicrup Widow of Tous, as Mother, with *Patria Potestas,* of the Minor Hector Tous Gonzalez, and Guardian of the Incapacitated, Jose Tous Gonzalez, Peti

tioner. *Ex parte.* Civil Case No. 299. *In re:* Ratification of Deed.

REPORT OF THE DISTRICT ATTORNEY.

The undersigned district attorney, having examined this record, informs the Court that he has no objection whatever to the granting of the petition. Ponce, Puerto Rico, April 7, 1937.

(Sgd.) PEDRO RODRIGUEZ SERRA,
Assistant District Attorney for this District.

In the District Court for the Judicial District of Ponce, P. R. Belen Gonzalez Salicrup, Widow of Tous, as Mother, with *Patria Potestas,* of the Minor Hector Tous Gonzalez, and Guardian of the Incapacitated, Jose Tous Gonzalez, Petitioner. *Ex parte.* Civil Case No. 299. *In re:* Ratification of Deed.

ORDER.

Whereas:—Petitioner herein Belen Gonzalez Salicrup, widow of Tous, as mother with *patria potestas* over her minor son Hector Tous Gonzalez, and the guardian of the incapacitated Jose Tous Gonzalez, appeared before this court and alleged that in civil case No. 7850, *In re:* Necessity and Utility, before this court, the petitioner was authorized, as mother with *patria potestas* over her children, minors at the time Belen Maria, Gladys and Jorge; and Hector Tous Gonzalez still a minor, and as guardian of the incapacitated Jose Tous Gonzalez, to take, by conveyance from the partnership Mario Mercado e Hijos, a mortgage credit constituted by Mrs. Elvira Olivieri Commins by public deed No. 13, dated March 23, 1932, executed in Mayaguez, Puerto Rico, before notary Fernando Zapater, acting in the place of Jose Tous Soto, regarding the estates hereinafter described, executing to this effect deed No. 33, dated May 9, 1933, before the aforesaid notary Fernando Zapater Martinez, *In re:* "Conveyance of Said Mortgage Credit", the encumbered estates being described as follows:

"A Joint Half Interest in the Following Real Properties:

Number One: A piece of rural property known as Juanita, lying in the 'Pueblo and Quebrada' barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galzanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the 'Rufina' plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said 'Rufina' plantation; on the west by land of the 'San Rafael' plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to 'Piedras Blancas' barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Number Two:—A piece of rural property known as 'Los Indios' lying in the Indios barrio within the municipal district of Guayanilla with an area of 430 cuerdas equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by 'Mario Mercado e Hijos' and formerly by 'Trujillo Mercado & Company' and by mangroves of the maritime zone; on the south by the Yauco river and by land of

the 'Mercedes' plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

"Respectively recorded in Volume 16 of Guayanilla, back of folio 24, Estate No. 711, Twelfth Record, and in Volume 33 of Guayanilla, folio 201, Estate No. 534 triplicate, Fourteenth Record."

Whereas:—It is further alleged that the said deed, *In re:* "Conveyance of Mortgage Credit" was executed exclusively so that the Heirs of Jose Tous Soto should have a fixed and certain rent, it being agreed that the said partnership Mario Mercado e Hijos should retain 3/4 of 1% of the interest stipulated in the said mortgage deed and as said partnership assumed the obligation to pay the interest for the conveyed mortgage at the rate of 8-1/4%, Mario Mercado Montalvo, individually, and the said partnership, constituting themselves solidary sureties, both of the principal of the mortgage conveyed and of the interest thereon for the time elapsed from the execution of said conveyance to the full payment of principal and interest, excluding therefore the right or rights set down in favor of the said partnership Mario Mercado e Hijos from the seventh clause of the said deed of "Constitution of Mortgage", said partnership reserving to itself the rights and obligations arising from said clause during all the time of the life of the said mortgage, said seventh clause literally transcribed reading as follows:

"Seventh:—Option to Purchase and Sell and to Lease. Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of

any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Matio Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

Whereas:—It is likewise alleged that, in order to ratify the above particulars, the petitioner, in her own behalf and in the capacity in which she appears in the present case, and together with the other heirs of legal age of Jose Tous Soto, executed deed No. 72, dated March 31, 1937, before notary Fernando Zapater Martinez.

Whereas:—At the trial of the present case, with the appearance of the district attorney, all the particulars alleged were shown, to the satisfaction of this court, by means of documentary and oral evidence, the district attorney having made a favorable report.

Therefore:—The court approves hereby deed No. 72, dated March 31, 1937, executed before notary Fernando Zapater Martinez, in so far as the same refers to the steps taken by petitioner, Mrs. Belen Gonzalez Salicrup, widow of Tous, as mother with *patria potestas* over her minor son, Hector Tous Gonzalez, and as guardian of the incapacitated, Jose Tous Gonzalez, for all the legal purposes that might be proper. Ponce, Puerto Rico, April 7, 1937.

(Sgd.) D. SEPULVEDA,
District Judge.

In the District Court for the Judicial District of Ponce, P.R.—Belen Gonzalez Salicrup et als., Petitioners. *In re:* Ratification of Deed. No. 299.

WITHDRAWAL OF PAPERS FROM RECORD.

Now comes before this Honorable Court the petitioner herein through her undersigned attorney and moves for the withdrawal from the record of deed No. 72, dated March 31, 1937, executed before F. Zapater. Ponce, P.R., April 13, 1937.

(Sgd.) F. ZAPATER,
Attorney for petitioner.

ORDER

Motion granted upon delivery of receipt.

(Sgd.) D. SEPULVEDA,
District Judge.

Ponce, P.R., April 14, 1937.

I received the foregoing instrument this 14th day of April, 1937.

(Sgd.) F. Zapater,
Attorney for petitioner.

(There is a cover page with the following legend: "299. Fernando Zapater,—Attorney and Notary Public, Ponce P.R.—District Court for the Judicial District of Ponce, P.R. Suit No. 299.—Belen G., widow of Tous, et al., Ex-parte, Petitioner. *In re:* Ratification of Deed. Fernando Zapater, Attorney for petitioner.

The complaint is dated April 6, 1937. Date of the inclusion of the case in the calendar: April 6, 1937. Date of the judgment: April 7, 1937. Remarks: Judgment entered April 8, 1937 on Folio 296 of Book 107 of Civil Judgments. 1,200 words. Rec. 301 o/c.

EXHIBIT G OF THE PLAINTIFF.

No. 30

Voluntary Mortgage

In Mayaguez, Puerto Rico, on this the 25th day of February, 1937,—

Before Me

Luis Lopez de Victoria, Attorney and Notary Public for Puerto Rico, with domicile and office in Yauco, Puerto Rico,

There Appear

On one side: Mrs. Elvira Olivieri Y Commins, of age, single on account of divorce, property owner and domiciled in Mayaguez, Puerto Rico,—

On the other side: Mr. Manuel Francisco Lluberas Pasarell, of age, property owner, domiciled in Yauco, married to Mrs. Hazel Kells.

I Certify to my personal knowledge of the parties and to their statements as to their being of age, their status, professions and place of residence. They assure that they have, and in my opinion they do have, the necessary legal qualifications for the present execution, and by virtue thereof, Mrs. Elvira Olivieri Commins sets forth:

First:—That she is the owner of the following real properties:

Number One—Rural: A tract of land consisting of 79.46 cuerdas, equivalent to 31 hectares, 23 ares, 8 centiares, and 79 miliares, lying in the Indios barrio of the municipal district of Guayanilla, which is made up of the following parcels: Parcel "A" with an area of 41.26 cuerdas known by the name of Cupey of flat land planted to sugar canes; Parcel "B" containing 4 cuerdas of flat land, planted to sugar canes; Parcel "C" having 20.52 cuerdas of semiflat land, at present planted to lesser crops; Parcel "D" containing 1.68 cuerdas of semiflat land planted to lesser crops; and Parcel "E" containing 12 cuerdas of semiflat land planted to lesser crops. The whole tract is bounded as follows: on the

north by land of Santia Olivieri, the track of the American Railroad Company and from the west angle of Parcel "D", by the municipal road leading from Guayanilla to the Boca barrio; on the south by land of Arturo Lluberas and nephews, by the Yauco river, by a 0.30-cuerda undivided parcel containing the pump and belonging to Santia and Elvira Olivieri Commins, and with land of Santia Olivieri Commins; on the east by land of Santia Olivieri, and on the west by land of Mariano Lugo, by land of Ramon Ramirez, and by an old road which divided land of Ramon Lluberas, Luis Cervoni, Dolores Lopez and land of Luis Cervoni and on the southwest land of Arturo Lluberas and nephews. The fact is recorded that all along the east side there is a private road belonging to Santia and Elvira Olivieri, 6 meters wide, which proceeds along the west side of Parcel "B" as far as the undivided 0.30-cuerda parcel where the irrigation pump stands. Within this tract, but enclosed by said Parcel "C" there is a small parcel of land jointly owned by Santia and Elvira Olivieri with an area of $0.25-cuerda and there is built thereon a small house with a concrete foundation for a pump. And it is hereby explained that the aforesaid parcels marked letters "E" and "D" are separated, the former, partly on its east side, by the road leading from Guayanilla to the Boca barrio and the latter by the railroad track, both in connection with Parcel "C", and the former is also separated, in connection with the latter, by the said railroad track.

Number Two:—A portion or parcel of saltpeter land lying in the Indios barrio of the municipal district of Guayanilla and bounded: on the north by land of Mario Mercado e Hijos; on the south by a cano within the land of Santia Olivieri; on the east by the Caribbean Sea and on the west by a 6-meter wide road, three meters of which is part of this parcel and the other three meters part of the parcel of land belonging to Santia Olivieri. Its area is 41.99 cuerdas, equivalent to 16 hectares, 50 ares, 37 centiares and 7 miliares of saltpeter land.

Number Three:—A $50.00 undivided half interest in the following $100.00-worth parcel:

Undivided parcel of land with an area of 0.30 cuerda, equivalent to 11 ares, 79 centiares and 12 miliares with a small house thereon fenced and roofed with galvanized-iron, with a steam pump with every accessory and pipes for pumping water from the Yauco river for the irrigation of the estates belonging to Santia and Elvira Olivieri, situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north by land belonging to Elvira Olivieri Commins; on the south by the Yauco river; on the east by land belonging to Santia Olivieri Commins and on the west by land belonging to Elvira Olivieri Commins.

Number Four:—A $50.00 undivided half interest in the following $100.00-worth parcel:

Rural. An undivided parcel of land measuring 0.25 cuerda, equivalent to 9 ares, 82 centiares, and 60 miliares, possibly destined to have installed thereon a pump for drawing water from adjacent springs, with a cement foundation with a small house roofed and fenced with galvanized iron and pipes. This parcel of land is situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north, west and east by Parcel "C" of the estate belonging to Elvira Olivieri Commins; and on the south by Parcel "A" known as Cupey from the same estate of Elvira Olivieri Commins.

Number Five: Rural. An estate known as "Juanita" lying in the Pueblo and Quebrada barrios of the municipal district of Guayanilla, with an area of 81.77 cuerdas of flat land applied to sugar canes and 378.91 cuerdas of wood and pasture land, and a water pump for irrigating said canes and a frame house with the galvanized-iron roof in poor condition. It is bounded on the north by land of the Heirs of Antonio Ramos, of Jesus Rodriguez, of Ricardo Rodriguez, of Dr. Jose Cobian, and of the Heirs of Lugo and a municipal road separating land partly of Mario Mercado e Hijos; on the south by land of Mario Mercado e Hijos and partly by a municipal road separating land of said concern,

by land of Santia de la Cruz de Pacheco, of Catalina Tirado and of Mario Mercado e Hijos; on the east by land of the aforesaid Mario Mercado e Hijos; on the northwest by land of the Heirs of Antonio Ramos and of Joaquin Diaz, of Herminia Morales, and the woodland of the San Rafael plantation, of the Heirs of Angela and Dario Franceschi; on the southwest by land of Mario Mercado e Hijos. This estate is crossed from south to the northwest by the tracks of the American Railroad Company of Puerto Rico. Its area is 460.68 cuerdas equivalent to 181 hectares, 6 ares and 57 centiares.

Second: The mortgagee acquired the aforesaid immovables on account of the actual distribution of rural estates for the reasons set forth in deed No. 73, executed on August 20, 1936, in Yauco, before notary Tomas Paz y Ruiz.

Liens

Third:—The immovables above described are encumbered exclusively by the following liens:—

A.—A lien in favor of Mario Mercado e Hijos constituted by deed No. 50, in Ponce, Puerto Rico, on April 5, 1927, before notary Francisco Parra Capo for ten years which began to run on June 2, 1927, and will expire on June 2, 1937.

B.—A first voluntary mortgage originally executed in favor of Mario Mercado e Hijos as security for the sum of $41,256.89, which was constituted by deed No. 13, executed in Mayaguez, Puerto Rico, on March 23, 1932, before notary Fernando Zapater Martinez, acting in the place of his colleague, Jose Tous Soto. Mrs. Elvira Olivieri Commins issued, granted and delivered in settlement of the mortgage debt to the partnership Mario Mercado e Hijos four promissory notes to bearer by indorsement, all of them to mature on March 23, 1939, promissory note No. 1 for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; promissory note No. 2 for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; promissory note No.

3 for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs, and, promissory note No. 4 for $11,256.89 as principal, plus $3,000.00 for interest and $500.00 for costs. This mortgage was constituted upon the condominiums held by Mrs. Elvira Olivieri Commins in two rural estates in joint ownership with Mrs. Santia Olivieri Commins, which joint ownership was dissolved by the aforesaid deed No. 73, dated August 20, 1936, executed before notary Tomas Paz y Ruiz, the portions allotted to Mrs. Elvira Olivieri Commins still being encumbered by such lien. The aforesaid mortgage credit was conveyed by Mario Mercado e Hijos to Mrs. Belen Gonzalez, widow of Tous, and children, as per deed No. 33, dated May 9, 1933, and executed before notary Fernando Zapater Martinez.

Acknowledgment of Indebtedness

Fourth:—Mrs. Elvira Olivieri Commins acknowledges to be indebted to Mr. Manuel Francisco Lluberas Pasarell in the sum of $45,000.00 as the amount of a loan that the latter has made to her in cash, in American legal tender, on this day, for six months to be counted from this day. The loan will bear interest from now on until the same is fully paid at the rate of 8% annually, interest to be paid together with the principal at maturity.

Mortgage

Fifth:—To secure the payment of the amount of the loan, $45,000.00, interest thereon and a further sum of $900.00 for disbursements, costs and attorney's fees in case of judicial recovery, Mrs. Elvira Olivieri Commins constitutes in favor of Mr. Manuel Francisco Lluberas Pasarell, a voluntary mortgage upon all and everyone of the estates described in the first paragraph of this deed, which lien will continue encumbering such immovables until the total cancellation of the proper record entry made in the Registry of Property.

Distribution of Liens

Sixth:—The mortgage lien is distributed among the immovables described, as follows: immovable No. One shall be liable for $38,900.00 as principal, with the respective interest thereon and $400.00 for costs, disbursements and attorney's fees in case of judicial recovery; immovable No. Two shall be liable for $700.00 as principal, with the respective interest thereon and $100.00 for disbursements, costs and attorney's fees in case of judicial recovery; immovable No. Three shall be liable for $200.00 as principal, interest thereon and $100.00 for disbursements, costs and attorney's fees in case of judicial recovery; immovable No. Four shall be liable for $200.00 as principal, interest thereon and $100.00 for disbursements, costs and attorney's fees in case of judicial recovery, and, immovable No. Five shall be liable for $5,000.00 as principal, interest thereon and $200.00 for disbursements, costs and attorney's fees in case of judicial recovery.

Seventh:—Pursuant to Article 127 of the Mortgage Law, the mortgaged immovables are appraised by mutual agreement between the parties as follows:—Immovable marked No. One, at $40,500.00; immovable marked No. Two, at $1,000.00; immovable marked No. Three, at $350.00; immovable marked No. Four, at $350.00; and, immovable marked No. Five, at $5,500.00.

Power of Attorney

Eighth:—It is expressly agreed between mortgagee and mortgagor that the loan of $45,000, made by the latter to the former is to be secured by a voluntary first mortgage on said immovables, and as the immovables appear encumbered by the mortgage above referred to, *viz.*, the one originally constituted in favor of Mario Mercado e Hijos and then conveyed to Mrs. Belen Gonzalez Salicrup, widow of Tous Soto and her children, Mrs. Elvira Olivieri Commins leaves in the possession of Mr. Manuel Francisco Lluberas Pasarell the $45,000.00 of the mortgage loan, and at the same time she designates, appoints and constitutes Mr.

Manuel Francisco Lluberas Pasarell her special attorney-in-fact in order that the latter, as the representative of herself personally and of her rights and actions, should proceed to effect the payment of the mortgage credit in favor of Mrs. Belen Gonzalez Salicrup, widow of Tous Soto and her children and to get back the mortgage notes representing said mortgage credit and should proceed to obtain the total cancellation of the said mortgage and should present a certified copy of the deed of cancellation or the paper representing the same in the Registry of Property of Ponce so that notice of such cancellation be entered in said Registry, with wide powers to the attorney-in-fact to make tender of payment of said mortgage credit, and in case of refusal to accept such payment, to proceed to deposit in the proper court the amount of such credit, leaving at the sound discretion of the attorney-in-fact the taking of the proper steps to obtain the cancellation of such mortgage. Once such mortgage credit has been satisfied and recorded in the Registry of Property of Ponce, the mortgage credit constituted by this deed in favor of Mr. Manuel Francisco Lluberas Pasarell, as first mortgage, attorney-in-fact, Mr. Lluberas Pasarell, shall return and deliver to Mrs. Elvira Olivieri Commins the balance up to $45,000.00, after deducting any disbursements made for securing the cancellation of such mortgage credit.

Ninth:—Mr. Manuel Francisco Lluberas Pasarell consents to the mortgage and both parties consent to this deed.

I, the notary, instructed the parties hereto regarding their rights and duties under the law and pertinent herein of which they were duly informed.

It is so executed before the witnesses herein, who are of age, known to me, without any legal impediment to act as such, and domiciled in Mayaguez, Attorney Jose Sabater and Mr. Manuel Pagan Esmoris.

And having been instructed of their right under the law to read the present deed themselves, of which right they availed themselves, the parties ratify its contents and the witnesses affix

their signatures, the parties hereto affixing also their respective initials to the other folios of this deed, in conformity with law.

To all of which I, the notary, Certify.

(Sgd.) ELVIRA OLIVIERI.
M. FRANCISCO LLUBERAS.
JOSE SABATER.
MANUEL PAGAN ESMORIS.

(Signed, signeted, sealed and paraphed.)

Luis Lopez de Victoria.

There are affixed to the original copy and cancelled the proper internal revenue stamps.

It is a true and faithful copy of its original which is deed No. 30, executed in Mayaguez, P.R., on February 25, 1937, on file in my protocol of public instruments to which I refer. And at the request of Mr. Manuel Francisco Lluberas Pasarell I issue the present copy on the same day of the execution of its original, leaving a note of this issuance. Internal revenue stamps worth $5.90 are herein cancelled.

(Sgd.) Luis Lopez de Victoria.

Signeted, paraphed and sealed by said notary. Each page bears the notarial seal and the paraph of the said notary. (At the back of the last page we find the following: a $0.50 internal revenue stamp and underneath it says: "A $0.50 stamp is cancelled, No. 1 Schedule of Fees.") (There is then stamped a rubber stamp reading as follows: "Presented at 10:00 A.M., on this date and entered on Folio 265 of Volume 285 of the Daybook. Ponce, P.R., March 1, 1937.

The Registrar: (Sgd.) Miguel Planellas.")

(There is then a handwritten note reading as follows: "This instrument has been recorded only as regards the estate described under number five on folio 164 of Volume 36 of Guayanilla, property No. 711 triplicate, Fourteenth Record. In addition to

the mortgage herein constituted, this estate is encumbered by the liens mentioned in this instrument. Ponce, March 9, 1937.

The Registrar: (Sgd.) Miguel Planellas."

There are affixed hereto and cancelled interral revenue stamps worth $9.00 and further down it says: "Cancelled: One $5.00 stamp, one $3.00 stamp and another $1.00 stamp. No. 5 of the Schedule of Fees, P.C. Dated as above.

(Sgd.) Miguel Planellas.)

(This deed has a cover page with the following legend: "Luis Lopez de Victoria. Attorney and Notary Public. P.O. Box 114. Telephone 47. Copy of deed No. 30 of Voluntary Mortgage. Executed: By Mrs. Elvira Olivieri Commins and Mr. Manuel Francisco Lluberas Pasarell. February 25, 1937. Mayaguez, Puerto Rico.")

EXHIBIT H OF THE PLAINTIFF.

Government of Puerto Rico. Department of Justice. District Court of Ponce. No. 702. April 8, 1937.

I received from Mario Mercado e Hijos the sum of $45,359.50 in Civil Case No. 310, deposited in bank notes.

Costs	$
Penalties	$
Deposited	$ 45,359.50
Total	$ 45,359.50

E. GOTAY PURCELL, Clerk.

A. MALDONADO,
Assistant clerk.

EXHIBIT I OF THE PLAINTIFF.

CANCELLATION OF MORTGAGE
No. 47.

In Ponce, Island of Puerto Rico, on March 8, 1937.

Before Me

Fernando Zapater y Martinez, Attorney and Notary Public for this Island, with place of residence, domicile and open office in this city,—

There Appear

Mrs. Luz Belen, Mrs. Ana-Rosa and Mrs. Alicia Tous Gonzalez, of age, joined by their respective spouses Mr. Vicente Usera Jr., Mr. Jose B. Carrion and Mr. Ignacio Maldonado,—

Miss Celia, Miss Belen-Maria, Miss Gladys and Mr. Jorge Tous Gonzalez. All the above parties are of age, property owners, domiciled in Ponce, except Mrs. Ana-Rosa Tous Gonzalez who resides in Humacao, said Jorge, Celia, Belen Maria and Gladys being single.

All of them appear herein in their own right.

Mrs. Belen Gonzalez Salicrup, widow of Tous, of age, property owner, domiciled in Ponce,—

Appears herein in her own behalf and moreover as mother with *patria potestas* over her minor son, Mr. Hector Tous Gonzalez, seventeen years old, single, property owner, and domiciled in Ponce, and as the guardian of Mr. Jose Tous Gonzalez, incapacitated, of age, single, property owner, and casually a resident of San Juan, Puerto Rico, all of which duly appears from the judgment rendered by the District Court of Ponce, P. R., whereby she is authorized to execute this deed, and which literally transcribed reads as follows:

"In the District Court for the Judicial District of Ponce, P. R.—Belen Gonzalez Salicrup, widow of Tous, as mother, with *patria potestas*, of the minor Hector Tous Gonzalez, and

guardian of the incapacitated, Jose Tous y Gonzalez, petitioner. Ex-parte. Civil case No. 203. —Judicial Authorization—

Order

"Whereas: Mrs. Belen Gonzalez Salicrup, widow of Tous, appeared before this court through her attorney Fernando Zapater Martinez and alleged: that petitioner is over 21 years of age, property owner domiciled in Ponce and mother with *patria potestas* over the minor Hector Tous Gonzalez, 17 years old, property owner, domiciled in Ponce, and guardian of Jose Tous Gonzalez, incapacitated, over 21 years of age, property owner, a casual resident of San Juan, Puerto Rico, which office the petitioner accepted and was sworn to before this court as appears from the proper Registry of Guardianship.

"Whereas: It is further alleged that by public deed No. 33, dated May 9, 1933, executed before notary Fernando Zapater Martinez, recorded in Volume 16 of Guayanilla, back of folio 24, estate No. 711, Twelfth record, and in Volume 33 of Guayanilla, folio 201, estate No. 534 triplicate, Fourteenth record, Mr. Mario Mercado Montalvo, in his capacity as managing partner of the agricultural civil partnership Mario Mercado e Hijos, domiciled in Guayanilla, Puerto Rico, and moreover in his own right, conveyed to Mrs. Belen Gonzalez, widow of Tous, petitioner herein, in her own behalf and also as mother with *patria potestas* over her children, Then minors, Belen-Maria, Gladys and Jorge; and Hector Tous Gonzalez, Still a Minor, and as guardian of Jose Tous Gonzalez, incapacitated; Luz-Belen, Ana-Rosa, Celia and Alicia Tous Gonzalez, a mortgage credit constituted by public deed No. 13, executed in Mayaguez on March 23, 1932, before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, by Mrs. Elvira Olivieri Commins, upon a jointly owned half interest in the immovables which are described as follows:

"Number One:—A piece of rural property known as 'Juanita' lying in the 'Pueblo and Quebrada' barrios within the judicial district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the 'Rufina' plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said 'Rufina' plantation; on the west by land of the 'San Rafael' plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to 'Piedras Blancas' barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Number Two:—A piece of rural property known as 'Los Indios' lying in the 'Indios' barrio within the municipal district of Guayanilla, with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the 'Barina' barrio to the 'Indios' barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by 'Mario Mercado e Hijos' and formerly by 'Trujillo Mercado & Company' and by mangroves of the maritime zone; on the south by the Yauco river and by land

of the 'Mercedes' plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

"Whereas: It is likewise alleged that such mortgage was constituted to secure the payment of four promissory notes payable to bearer by indorsement and maturing all of them on March 23, 1939, subscribed by said Mrs. Elvira Olivieri Commins for the following amounts: Note No. One for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; Note No. Two for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; Note No. Three for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs, and Note No. Four for $11,256.89 as principal, plus $3,000.00 for interest and $500.00 for costs, such mortgage securing, besides the principal of the aforesaid notes, the sum of $11,100.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery, which promissory notes were, by virtue of such deed of conveyance of mortgage credit, duly endorsed to the Heirs of Jose Tous Soto above mentioned.

"Whereas: It is further alleged that Mrs. Belen Gonzalez, widow of Tous, has an interest in such mortgage credit amounting to $21,256.89 and the balance, that is, the sum of $20,000.00 is distributed in equal shares among all her children of age and minors and therefore the minor Hector Tous Gonzalez and the incapacitated Jose Tous Gonzalez being entitled each, to $2,222.22-2/9; that the mortgagee, pursuant to clause 9 of the said mortgage deed, wherein it is provided that she may pay at any time before maturity the aforesaid mortgage credit, has applied for the cancellation of such mortgage, and such creditors as are of age are willing to cancel said credit, and have directed notary Fernando Zapater Martinez to proceed to draw up the proper deed.

"Whereas: After a hearing on this petition, with the ap-

pearance of the district attorney, each and every one of the particulars set forth were shown to the satisfaction of this court by means of documentary and oral evidence, the Honorable District Attorney having made a favorable report.

"Therefore: The court does hereby authorize Mrs. Belen Gonzalez Salicrup, widow of Tous, to appear before a notary and execute the proper deed of cancellation of mortgage as to the interests therein of the minor Hector Tous Gonzalez and the incapacitated Jose Tous Gonzalez and the amount of such interests in the principal of the aforesaid mortgage corresponding to the aforesaid minor and incapacitated, shall be deposited in the office of the clerk of this court, to be disposed of according to further orders of this court. Ponce, Puerto Rico, March 5, 1937.

(Sgd.) D. Sepulveda, District Judge."

I Do Hereby Certify that the Foregoing Is a True and Faithful Copy of Its Original which I have had in view for this cancellation, and I likewise certify to my personal knowledge of the appearing parties and in accordance with their statements I also certify to their personal characteristics. They assure me that they are in full possession of their civil rights and as they possess, in my opinion, the necessary legal qualifications for executing this deed, they set forth:

First:—The appearing parties make it known that the mortgage promissory notes referred to in the order of the district court above transcribe are in the possession of the appearing parties named Tous Gonzalez and Gonzalez Salicrup, widow of Tous, and different only in number and amount, they are as follows:

"No. For $. To become due . I promise to pay to the holder by indorsement of this promissory note on day, 193 , the sum of received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No.

, of a series of four, totalling $. To secure the above sum, $ for interest thereon and $ for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto. upon a one-half interest belonging to me in two jointly owned estates, one of them called 'Juanita', with an area of 481.77 cuerdas more or less, lying in the Pueblo and Quebrada barrios of the municipal district of, Guayanilla, Puerto Rico, and the other called 'Los Indios' with an area of 430 cuerdas lying in the 'Indios' barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) Elvira Olivieri.

Affidavit No. . Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Yauco, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

(There is affixed thereto and cancelled a $0.25 internal revenue stamp and affixed thereto the notarial seal.)"

I do hereby certify that the foregoing is a true and faithful transcription of its original which I have had before me.

Second:—And the parties hereto having agreed upon the cancellation of the aforesaid mortgage, they proceed to such cancellation as follows:—

First

Mrs. Belen Gonzalez Salicrup, widow of Tous, states that she has received prior hereto, in her own behalf and having first secured the consent of all the parties named Tous Gonzalez, of age, a check for the sum of $36,812.43 on the Credito & Ahorro

Ponceno (Yauco branch), made out by Mr. M. Francisco Lluberas, and also that she has received, payable to the clerk of the district court for the judicial district of Ponce, another check on the same bank, made out by the same person, for $4,444.46, which latter sum represents the share of the minor Hector Tous Gonzalez and that of Jose Tous Gonzalez, incapacitated, of the aforesaid mortgage credit and which she has deposited in the office of the clerk of said court pursuant to the order transcribed, all the above items totalling $41,256.89, which represents the principal of the mortgage mentioned in the order of the District Court of Ponce already transcribed, whereby all the parties hereto give, as regards their respective rights and representations, a formal receipt and the fullest discharge and state that all the interest on said mortgage having been punctually satisfied, no sums being absolutely left unpaid on that score, thus relieving from all liability the partnership Mario Mercado e Hijos, which is the conveyor of such mortgage credit, as well as Mr. Mario Mercado Montalvo, personally by reason of the conveyance of the aforesaid mortgage constituted by deed No. 33, of May 9, 1933, before the attesting notary.

Second

By virtue of the terms of the foregoing clause, Mrs. Belen Gonzalez, in her own right and in the representation assumed by her herein, conformable to the order of the District Court for the Judicial District of Ponce already transcribed, Dona Luz-Belen, Dona Ana-Rosa, Dona Alicia, Doña Celia, Dona Belen-Maria, Dona Gladys and Don Jorge Tous Gonzalez, the first three parties with the express consent of their respective spouses Don Vicente Usera, Jr., Don Jose B. Carrion and Don Ignacio Maldonado, acknowledge as fully cancelled and extinguished the mortgage constituted by deed No. 13, dated March 23, 1932, executed before notary Jose Tous Soto, the attesting notary in said execution acting as a substitute, in favor of the partnersnip

Mario Mercado e Hijos, and conveyed subsequently to the parties hereto by said deed No. 33, dated May 9, 1933, before me, such cancellation to be recorded in the proper registry of property conformable to the wish and consent of the parties.

Third

Mrs. Belen González Salicrup, widow of Tous, has now delivered to me the four mortgage promissory notes in question to be cancelled, and I, the notary, proceeds to do so by writing on their face as follows:

"This promissory note has been cancelled by virtue of the cancellation of the deed of even date, in my presence. Ponce, Puerto Rico, March 8, 1937.

F. Zapater,
Notary Public."

After the foregoing proceeding I attach to the copy of this deed the aforesaid mortgage promissory notes so cancelled.

Fourth

The parties hereto accept the present deed as drafted as conformable to the agreement between them; and I, the notary, in compliance with the legal requirements advised them as to the legal and pertinent provisions concerning the execution. It is so stated and executed in my presence and that of the witnesses, legally qualified, domiciled in this city and known to me, Mr. Cesar Matos and Mr. Julio A. Lind.

After reading the present deed by the parties and the witnesses pursuant to their right as told by me, the former ratified their consent and all of them affixed their signatures before me, the notary, who certify to the contents of this public instrument and I further certify that in the execution of this deed all the legal

requisites of the Notarial Law have been complied with and the last amendment thereto regarding the initials of the parties.

(Sgd.) BELEN G. WIDOW OF TOUS SOTO.
CELIA TOUS.
JORGE TOUS.
GLADYS TOUS.
BELEN MARIA TOUS.
ANA ROSA TOUS DE CARRION.
J. B. CARRION.
I. MALDONADO.
ALICIA TOUS DE MALDONADO.
LUZ B. TOUS DE USERA.
V. USERA, Jr.

(Sgd.) JULIO A. LIND.
C. B. MATOS.

Signed, signeted, sealed and paraphed:

F. Zapater.

There are affixed hereto and cancelled the proper internal revenue stamps.

Initials: B.G.T.—C.T.—J.T.G.T.—B.M.T.—J.B.C.—A.R.T.C.—I.M.Q.—A.T.M.—L.B.T.U.—V.U., Jr.

It is a true and faithful copy of its original to which I refer and which, under the number indicated on the first page, is on file in my current protocol of public instruments in this, my notarial office. In witness whereof and at the request of Mrs. Elvira Oliv-ieri Commins I issue this copy which I sign, signet, paraph and seal in Ponce, Puerto Rico, on the same day of the same month and year of its execution.

(Sgd.) F. Zapater.

(There is affixed hereto the signet and paraph of said notary and the notarial seal is stamped on all its pages. There are affixed hereto and cancelled internal revenue stamps worth $4.70.)

(There is hereon the imprint of a rubber stamp with the fol-

lowing legend: "Presented: at 2:30 P.M. on this date for inclusion on folio 31 of Volume 188 of the Daybook, Ponce, P.R., March 10, 1937. The Registrar: (Sgd.) Miguel Planellas.")

(The seal of the Registry of Property is here duly stamped.)

(There is underneath a handwritten note reading as follows: "The proper cancellation is made where indicated on the margin of the description of each of the two estates referred to. Ponce, March 20, 1937. The Registrar: (Sgd.) Miguel Planellas.")

(There are affixed hereto and cancelled five internal revenue stamps worth $10.00 each; another worth $5.00, another worth $3.00 and another worth $0.50.)

(And there is lower down a note reading as follows: "Cancelled: five $10.00 stamps; one $5.00 stamp, one $3.00 stamp and another $0.50 stamp. No. 3 Schedule of Fees and Political Code. Dated as above. (Sgd.) Miguel Planellas.")

(On the margin of Estate No. One, there is a notice of the Registry of Property which reads as follows: "Volume 34, of Guayanilla, on the margin of the Twelfth Record of Estate No. 711 duplicate on folio 1.") The seal of the Registry is also stamped.

(On the margin of the description of property No. Two there is a notice of the Registry reading as follows: "Volume 36 of Guayanilla, back of folio 187, Estate No. 534 quadruplicate, Sixteenth Record."

The cover page has thereon the following legend:

> "Attorney Fernando Zapater Martinez—Attorney and Notary Public—No. 47—Deed of Cancellation of Mortgage—Executed by Mrs. Luz Belen Tous Gonzalez et als. in favor of Mrs. Elvira Olivieri Commins. March 8, 1937. In Ponce, Puerto Rico. Ponce, Puerto Rico."

EXHIBIT J OF THE PLAINTIFF.

VOLUNTARY MORTGAGE

No. 13

Mayaguez, Puerto Rico, March 23, 1932.

Before Me

Fernando Zapater Martinez, attorney and notary public for this Island, with residence, domicile and office in Ponce, Puerto Rico, acting in the place of my colleague Jose Tous Soto,—

There Appear

Mrs. Elvira Olivieri Commins, of age, single on account of divorce, property owner, domiciled in Yauco,—

Mr. Arturo Cortes y Valls, of age, married, an employee, domiciled in Guayanilla, Puerto Rico, who appears in the execution of the present deed in the name and representation of the agricultural civil partnership Mario Mercado e Hijos, domiciled in Guayanilla, by virtue of the powers granted to him by deed No. 39, executed before notary Jose Tous Soto, on February 16, 1927, which he will prove wherever and whenever necessary.

I certify to my personal knowledge of the parties hereto and to their personal characteristics as furnished by them. They assure me to be in the full enjoyment and exercise of their civil rights and in my opinion they possess the necessary legal qualifications for this execution. They state as follows:—

First:—That Mrs. Olivieri y Commins owns a one-half joint interest in the immovables described as follows:

Number One:—A piece of rural property known as "Juanita" lying in the "Pueblo and Quebrada" barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing pro-

duce. It is bounded on the north by land of Rafael Lopez, of the "Rufina" plantation belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said "Rufina" plantation; on the west by land of the "San Rafael" plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to "Piedras Blancas" barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

Title:—This estate was formed by a consolidation effected by deed No. 179, executed before notary Angel Padro, of Yauco, on November 28, 1907.

Number Two:—A piece of rural property known as "Los Indios" lying in the Indios barrio, within the municipal district of Guayanilla, with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado & Compania, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Compania and by mangroves of the maritime zone; on the south by the Yauco river and by land of the "Mercedes" plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

Title:—This jointly owned interest was acquired by Mrs. Elvira Olivieri y Commins by inheritance from Josefa Commins y Raldiris and it is recorded in the Registry of Property in the

name of Mrs. Elvira Olivieri Commins on Folio 222 of Volume 12 of Guayanilla, Estate No. 534, First record.

Second:—That the estates above described are encumbered by a lease constituted in favor of Mario Mercado e Hijos by deed No. 55, executed on April 5, 1927, before notary Francisco Parra Capo, of Ponce.

Third:—Mrs. Elvira Olivieri Commins acknowledges to be indebted to the partnership Mario Mercado e Hijos in the sum of $41,256.89 by reason of a current account with liquidated interest up to March 23, 1932.

Fourth:—Mrs. Elvira Olivieri Commins has agreed to pay to the partnership Mario Mercado e Hijos the amount owed by her, as hereinafter expressed, and to that effect she executes:

First

Mrs. Elvira Olivieri Commins, in payment of the amount owed by her to the partnership Mario Mercado e Hijos, as stated in the preceding third paragraph, executes and delivers to said partnership through the attorney-in-fact, Arturo Cortes Valls, four promissory notes payable to bearer by endorsement, to fall due all of them on March 23, 1939, and subscribed by said lady for the following amounts:

Promissory note No. One for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

Promissory Note No. Two for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

Promissory note No. Three for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

And promissory note No. Four for $11,256.89 as principal, $3,000.00 for interest thereon and $500.00 for costs.

Said promissory notes shall differ from each other only in their correlative numbers and amounts. They are as follows:

No. . For $. To become due . I promise to pay to the holder by indorsement of this promissory note on day, 193 , the sum of received to my entire satisfaction as a

loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. , of a series of four, totalling $. To secure the above sum, $ for interest thereon and $ for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called "Juanita", with an area of 481.77 cuerdas more or less, lying in the Pueblo and Quebrada barrios of the municipal district of Guayanilla, Puerto Rico, and the other called "Los Indios", with an area of 430 cuerdas, lying in the Indios barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) ELVIRA OLIVIERI.

Affidavit No. . Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Yauco, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

There is affixed thereto and cancelled a $0.25 internal revenue stamp and affixed thereto the notarial seal.

Second

Mrs. Elvira Olivieri Commins constitutes a voluntary mortgage upon her jointly owned interests in each of the estates above described to secure all and each of the promissory notes referred to in the foregoing clause, which lien shall encumber such condominiums until the mortgage hereby constituted is legally cancelled. Said mortgage will secure in addition to the principal of the aforesaid promissory notes, the sum of $11,100.00 for interest thereon and $2,000.00 for costs, expenses, disbursements and

attorney's fees in case of judicial recovery and demandable as a penalty in such event without the necessity of a liquidation.

Third

Mrs. Elvira Olivieri y Commins and Mr. Arturo Cortes y Valls, in behalf of the partnership Mario Mercado e Hijos, appraise the mortgaged condominiums, waiving any new appraisal or action for such purpose, as follows:

The jointly owned interest in the estate described in the first place at $25,000.00.

The jointly owned interest in the estate described in the second place at $50,000.00,

Fourth

Mrs. Elvira Olivieri Commins agrees with the partnership Mario Mercado e Hijos, that out of the rentals to which she is entitled under the contract of lease referred to in the second paragraph of said deed, that is, the sum of $4,100.00, said partnership shall retain, to be applied to the payment of the interest accrued, the sum required to cover the above amount, such retention to begin on June 2, 1932, and so on every time the same becomes due, that is, on March 4 and June 2 of each year.

Fifth

It is stipulated that by failing to pay three installments of interest upon becoming due, the obligor shall forfeit the right to avail herself of the term allowed for paying the principal and the obligee may recover judicially on all or either of the promissory notes by means of a summary or an ordinary action.

Sixth

If at the termination of the contract of lease referred to in paragraph second of this instrument, the mortgage promissory notes have not been paid, the obligor or her assignees or successors in interest bind themselves to impose upon any lessee the obligation to deduct from the rentals agreed upon the necessary sums for the payment of the interest owing to Mario Mercado e

Hijos and to effect such payment to said partnership on the account of the obligor, as stipulated in clause 4 of this deed.

Seventh

Option to Purchase and Sell and to Lease:—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates "Indios" and "Juanita" upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee.

Eighth

Waiver of Homestead. Mrs. Elvira Olivieri Commins states that no homestead right has been constituted by her on any of the estates hereinbefore described, but that should she do so in the future, from now on and for all time, she waives the same in favor of the partnership Mario Mercado e Hijos, its assignees or successors in interest, in consideration of the present contract and during the life thereof.

Ninth

It is stipulated by the parties that the obligor may pay at any time before maturity the mortgage credit herein constituted or may pay on account thereof any amount not below $5,000.00, provided she serves notice on the obligee three months prior to the time when she intends to effect the payment of the principal or the sum on account of such principal.

Tenth

The parties likewise expressly state that the lessor has received all back rentals up to date regarding the estate described and that in the present case she has received a check for $1,500.00 on the Banco de Ponce in settlement of the annual installment becoming due in the current month of March.

Eleventh

The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force.

Twelfth

For the purpose of the Registry, the mortgage lien affecting the condominiums is prorated as follows:

The jointly owned interest in the estate described in the first place shall answer for:

The sum of $12,379.08 as principal,—

The sum of $3,330.00 as interest,—

The sum of $600.00 for costs.

And the jointly owned interest in estate No. Two shall answer for the sum of $28,877.81 as principal,—

The sum of $1,400.00 for costs, expenses and attorney's fees, and for interest on $7770.00

Thirteenth

All the expenses incurred by reason of the present deed, copy thereof and record in the Registry of Property and those of cancellation at the proper time, copy thereof and record shall be for the account of the obligor.

Fourteenth

Each of the parties hereto, as far as the same is concerned, agree to the present deed in every respect as conformable to the terms agreed upon.

It was so stated, executed and signed in the presence of wit-

nesses Jose Nadal Grau and Oscar Souffront, residents of this district, of age, qualified and known to me. This deed has been read by me to the parties and to the witnesses upon their waiving the right to do so themselves, which I warned them they could do, its contents was ratified by the parties and they and the witnesses affixed their signatures,—in witness whereof and of everything stated I, the notary, Certify. At this stage, it is set down by the parties that the sum referred to in the third paragraph of this deed as owed by Mrs. Elvira Olivieri Commins to the partnership Mario Mercado e Hijos amounting to $41,256.89, represents the total of the amount due up to date in every respect.

(Sgd.) ELVIRA OLIVIERI.
A. CORTES.
Dr. J. NADAL GRAU.
OSCAR SOUFFRONT.

Signed, signeted, sealed and paraphed:

F. Zapater.

There are affixed hereto and cancelled the proper internal revenue stamps. The parties affixed their signatures on the margin of each folio.

It is a true and faithful copy of its original and which, under the number indicated at the beginning, is on file in my current protocol of public instruments of the notarial office of my colleague Jose Tous Soto, in whose place I have acted due to his absence. In witness whereof and at the request of the interested party I issue this copy which I sign, signet, paraph and seal with the seal of this notarial office on the very day, month and year of its execution.

(Sgd.) F. Zapater.

There appears herein the paraph and signet of such notary as well as the notarial seal which is stamped on all its pages. There are affixed hereto and cancelled internal revenue stamps worth $5.80.

The cover page contains the following legend: "Jose Tous

Soto—Attorney and Notary Public—No. 13—Deed of Voluntary Mortgage—Executed in Mayaguez by Mrs. Elvira Olivieri y Commins and Mr. Arturo Cortes Valls on March 23, 1932—Ponce, Puerto Rico."

EXHIBIT K OF THE PLAINTIFF.

NOTARIAL ACT OF DEMAND

No. 7

Ponce, Puerto Rico, April 6, 1937.

Before Me

Pedro M. Porrata, Attorney and Notary Public for this Island, with domicile, residence and office in Ponce,—

There Appears

Mr. Mario Mercado Riera, of age, married, property owner, domiciled in Ponce, who appears herein in his capacity as assistant manager of the agricultural civil partnership "Mario Mercado e Hijos", domiciled in Guayanilla, Island of Puerto Rico, such partnership being constituted by public deed No. 36, dated July 13, 1916, as executed before notary Antonio F. Castro, extended and modified by another deed executed in Ponce, before notary Jose Tous Soto under No. 99, dated June 11, 1926, Mr. Mercado having duly proven his power for executing such deed.

I Certify to my personal knowledge of Mr. Mario Mercado Riera and of his personal characteristics as stated by him. He assures me to be in the full enjoyment and exercise of his civil rights and having in my opinion the necessary legal qualifications for this execution, states:—

First:—That by public deed No. 13, executed in Mayaguez, Puerto Rico, on March 23, 1932, before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, Mrs. Elvira Olivieri Commins executed a voluntary mortgage upon the condominiums which will be next described, in order to secure four promissory notes payable to bearer by indorsement and to mature

all of them on March 23, 1939, for the following amounts: Note No. One for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; Note No. Two for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; Note No. Three for $10,000.00 as principal, plus $2,700.00 for interest and $500.00 for costs; and Note No. Four for $11,256.89 as principal, plus $3,000.00 for interest and $500.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery, which promissory notes were delivered at the time of such execution to the partnership Mario Mercado e Hijos, represented for such deed by its attorney-in-fact Mr. Arturo Cortes Valls.

One-Half Undivided Joint Interest in the Following Immovables:—

Number One:—A piece of rural property known as "Juanita" lying in the "Pueblo and Quebrada" barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the "Rufina" plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said "Rufina" plantation; on the west by land of the "San Rafael" plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to "Piedras Blancas" barrio and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

Number Two:—A piece of rural property known as "Los Indios" lying in the "Indios" barrio within the municipal district of Guayanilla with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter

works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by "Trujillo & Mercado & Compania" now "Mario Mercado e Hijos", and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by "Trujillo Mercado & Compania" and by mangroves of the maritime zone; on the south by the Yauco river and by land of the "Mercedes" plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

The above estates are respectively recorded in Volume 16 of Guayanilla, back of folio 24, estate No. 711, Twelfth record, and in Volume 33 of Guayanilla, folio 201, estate No. 534 triplicate, Fourteenth record.

Second:—That in the aforesaid mortgage deed a clause was inserted which literally transcribed reads as follows:

"Seventh:—Option to Purchase and Sell and to Lease. Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hios, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogat-

ing itself to the place, degree or priority of the purchaser or lessee."

I Do Hereby Certify That the Above is a true and faithful copy of its original which I have kept before me during this proceeding.

Third:—That the estates hereinbefore described were actually partitioned by their co-owners Mrs. Elvira Olivieri Commins and Mrs. Santia Olivieri Commins by public deed No. 23 dated August 20, 1936, executed before notary Tomas Paz y Ruiz, there being allotted to Mrs. Elvira Olivieri Commins the following parcels and undivided joint interests segregated from the estates known as "Los Indios" as well as from the above described estate known as "Juanita" with her present area of 460.68 cuerdas, equivalent to 181 hectares, 6 ares and 57 centiares.

Segregated Parcels from the Estate "Los Indios" which were awarded to her:—

Full ownership of parcel No. One described in the fifth paragraph of the said deed of actual partition described as follows:

Rural Estate:—A parcel of land containing 79.46 cuerdas, equivalent to 31 hectares, 23 ares, 8 centiares, 79 miliares, lying in the Indios barrio within the municipal district of Guayanilla, which are subdivided in the following five parcels, which according to the plat of the survey made by engineer Juan Herminio Sanchez Diaz on December 5, 1935, are marked as follows: Parcel "A" with an area of 41.26 cuerdas known by the name of Cupey of flat land planted to sugar canes; Parcel "B" containing 4 cuerdas, of flat land, planted to sugar canes; Parcel "C" having 20.52 cuerdas of semiflat land at present planted to lesser crops; Parcel "D" containing 1.68 cuerdas of semiflat land planted to lessor crops; and Parcel "E" containing 12 cuerdas of semiflat land planted to lesser crops. The whole tract is bounded as follows: on the north by land of Santia Olivieri, the track of the American Railroad Company and from the west angle of Parcel "B" by the municipal road leading from Guayanilla to the Boca barrio; on the south by land of Arturo Lluberas and nephews, by

the Yauco river, by a 0.30-cuerda undivided parcel containing the pump and belonging to Santia and Elvira Olivieri Commins, and by land of Santia Olivieri; on the east by land of Santia Olivieri, and on the west by land of Mariano Lugo, by land of Ramon Ramirez, and by an old road which divided land of Ramon Lluberas, Luis Cervoni, Dolores Lopez and land of Luis Cervoni and on the southwest land of Arturo Lluberas and nephews. The fact is recorded that all along the east side there is a private road belonging to Santia and Elvira Olivieri, 6 meters wide, which proceeds along the west side of Parcel "B" as far as the undivided 0.30-cuerda parcel where the irrigation pump stands. Within this tract, but enclosed by said Parcel "C" there is a small parcel of land jointly owned by Santia and Elvira Olivieri with an area of 0.25 cuerda and there is built thereon a small house with a concrete foundation for a pump. And it is hereby explained that the aforesaid parcels marked letters "E" and "D" are separated, the former, partly on its east side, by the road leading from Guayanilla to Boca barrio and the latter by the railroad track, both in connection with Parcel "C", and the former is also separated in connection with the latter by the said railroad track. (*sic*)

Full Ownership of Parcel No. Two Described in Paragraph Fifth of the Aforesaid Deed, *viz.*:

Number Two:—Parcel of saltpeter land lying in the Indios barrio of the municipal district of Guayanilla and bounded: on the north by land of Mario Mercado e Hijos; on the south by a cano within the land of Santia Olivieri; on the east by the Caribbean Sea and on the west by a 6-meter wide road, three meters of which is part of this parcel and the other three meters part of the parcel of land belonging to Santia Olivieri. Its area is 41.99 cuerdas, equivalent to 16 hectares, 50 ares, 37 centiares and 7 miliares of saltpeter land.

A $50 Undivided Half Interest in the $100.00-Worth Parcel No. Four Described in the Fifth Paragraph of the Said Deed of Actual Partition, *viz.*:

Rural: Undivided parcel of land with an area of 0.30 cuerda, equivalent to 11 ares, 79 centiares and 12 miliares with a small house thereon fenced and roofed with galvanized iron, with a steam pump with every accessory and pipes for pumping water from the Yauco river for the irrigation of the estates belonging to Santia and Elvira Olivieri, situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north by land belonging to Elvira Olivieri Commins; on the south by the Yauco river; on the east by land belonging to Santia Olivieri Commins and on the west by land belonging to Elvira Olivieri Commins.

A $175.00-Worth Interest in the Value of the Pump Standing on Said Parcel, Which Pump Was Appraised at $700.00.

A $50.00 Undivided Half interest in the $100.00-worth parcel No. Five of said paragraph fifth, *viz.*:

Rural: An undivided parcel of land measuring 0.25 cuerda, equivalent to 9 ares, 82 centiares and 60 miliares, possibly destined to have installed thereon a pump for drawing water from adjacent springs, with a cement foundation with a small house roofed and fenced with galvanized iron and pipes. This parcel of land is situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north, west and east by Parcel "C" of the estate belonging to Elvira Olivieri Commins; and on the south by Parcel "A" known as Cupey from the same estate of Elvira Olivieri Commins.

Fourth: That according to public deed No. 40, executed before notary Luis Lopez de Victoria in Mayaguez on March 9, 1937, Mrs. Elvira Olivieri Commins sold to the spouses Mr. Manuel Francisco Lluberas Pasarell and Mrs. Hazel Kelis (*sic*) Lluberas, the former acting not only in his own behalf, but as the agent of Mrs. Antonia Lluberas Pasarell, widow of Dr. Carlos G. Armstrong; of Dona Rosa Elena Lluberas Pasarell; of Dona Graciela Lluberas Pasarell, married to Mr. Antonio Valenti Maestre; of Dona Celia Lluberas Pasarell, married to Mr. Emilio Blasini Totti, and of Dona Raquel Lluberas Pasarell, the immovables and

undivided joint interests which have been described in the foregoing third paragraph, and which were awarded to her in the actual partition above referred to, excluding from the said sale the estate known as Juanita above described, the purchase price of such sale being $40,000.00, the purchase price being distributed in the said deed of sale among the estates thus sold as follows:—The estate described under No. One in such deed was assessed at $35,000.00; the estate described under No. Two at $1,000.00; the estate described under No. Three at $2,000.00, that is, the undivided interest; and the undivided interest described under No. Four at $2,000.00, said purchasers acquiring each of them, share and share alike, an undivided joint interest in each of the immovables and condominiums involved in said contract of sale, there being included in said conveyance all the rights, uses, servitudes, joint interests in the irrigation pump, annexes and everything contained in and rights pertaining to said estates.

Fifth:—That in the said deed of sale, the mortgage constituted by Mrs. Elvira Olivieri Commins by deed No. 30, executed in Mayaguez, before notary Luis Lopez de Victoria and dated February 25, 1937, remained in force in favor of Mr. Manuel Francisco Lluberas and his wife only to the extent of $5,000.00 as principal, with interest thereon at 6% annually, payable at the end of every twelve months for five years, to mature on February 25, 1942, plus $200.00 for costs, expenses and attorney's fees in case of judicial recovery.

Sixth:—That by public deed No. 41, executed on March 9, 1937, before notary Luis Lopez de Victoria, Mrs. Elvira Olivieri Commins, leased to Mr. Emilio Blasini Totti, the estate known as Juanita for ten years to run from March 5, 1938 to March 5, 1948, at the rental of $3250.00 annually, payable in twelve monthly parts in advance, from March 5, 1938 on and during the life of the lease and under the other terms stated in detail in the said deed of lease.

Seventh:—Said Mario Mercado y Riera, in his capacity as assistant-manager of the partnership Mario Mercado e Hijos, has

delivered to me, now, the following amounts in U. S. legal tender, namely: $40,000.00 the purchase price of the immovables sold by virtue of deed No. 40 executed on March 9, 1937, before notary Luis Lopez de Victoria by Mrs. Elvira Olivieri Commins to the purchasers therein, above mentioned; the sum of $200.00 as the cost of the above deed of sale of the said immovables; the sum of $20.00 to pay the copy of the said deed and stamps cancelled thereon; the sum of $89.50 as fees of the registration of said deed and, moreover, the sum of $50.00 for any further incidental expenses not mentioned above, making a total of $40,359.50, in order that as an attorney I should request the spouses Manuel Francisco Lluberas Pasarell and Mrs. Hazel Kilis (*sic*) Lluberas, in their own rights, and, moreover, the former as the representative of said Mrs. Antonia Lluberas Pasarell; of Dona Rosa Elena Lluberas Pasarell; of Mrs. Graciela Lluberas Pasarell, married to Antonio Valenti Maestre; of Mrs. Celina Lluberas Pasarell, married to Emilio Blasini Totti, and Dona Raquel Lluberas Pasarell, to execute the proper deed of conveyance of the estates and condominiums sold and above described to the partnership Mario Mercado e Hijos, delivering to them the aforesaid sums, and in case of refusal on their part to make such conveyance, to advise them that the said amount of $40,359.50 will be deposited in the office of the clerk of the District Court of Ponce, I mean, in the hands of the clerk thereof in connection with the proper action that will be brought against them as purchasers; and likewise, said Mario Mercado y Riera requests me to summon Mrs. Elvira Olivieri Commins together with Mr. Emilio Blasini Totti and Mrs. Celia Lluberas Pasarell, who will also be served with notice of the notarial act of demand, to assign to the partnership Mario Mercado e Hijos the aforesaid contract of lease constituted by deed No. 41, executed on March 9, 1937, before notary Luis Lopez de Victoria, said partnership Mario Mercado e Hijos being ready to take over said contract of lease on the same terms and conditions upon which the said contract of lease was executed, said

partnership undertaking to furnish the proper bond, if required, to guarantee fully and faithfully the payment of the rentals to be accrued and, should they refuse, to properly assign said contract of lease, to caution them that the proper action against them will be brought in the District Court for the Judicial District of Ponce. I am further requested by Mr. Mario Mercado Riera, as assistant-manager of Mario Mercado e Hijos, to advise Mrs. Elvira Olivieri Commins that in case the mortgage deal for $5,000.00 which appears connected with said deed of purchase should be part of the consideration for such sale, that the partnership Mario Mercado e Hijos is ready to furnish her the amount borrowed from Mr. Manuel Francisco Lluberas Pasarell and to execute the proper mortgage under the same terms and stipulations contained in the aforesaid deed of sale and in deed No. 30, executed on February 25, 1937, before notary Luis Lopez de Victoria, *In re:* "Constitution of Mortgage".

It was so stated and executed in my presence and in that of the witnesses, legally qualified, domiciled in this city and known to me, Mr. Ulises Petrilli and Mr. Felix Neri Vazques.

The present Notarial Act having been read by Mr. Mario Mercado Riera and the witnesses in the exercise of their rights as advised by me, the former ratifies its contents and signs together with the witnesses before me, the notary, who certify to everything above stated as well as to the fact that in the execution of the present instrument all the requisites of the Notarial Law and its amendments have been complied with.

(Sgd.) MARIO MERCADO, Jr.
U. PETRILLI.
F. NERI VAZQUEZ.

Signed, signeted, sealed and paraphed:

Pedro M. Porrata.

There is affixed hereto and duly cancelled a $1.00 internal revenue stamp and the notarial seal stamped thereon.

RETURN OF THE SERVICE OF DEMAND UPON MRS. ELVIRA OLIVIERI COMMINS AS TO THE SALE AND LEASE.

In the city of Mayaguez, Island of Puerto Rico, and at 5:00 P.M. of April 6, 1937, I, Pedro M. Porrata, attorney and notary public, with my domicile, residence and office in the city of Ponce, and in accordance with the foregoing notice of demand, for which I was commissioned by Mr. Mario Mercado y Riera in his capacity as assistant-manager of the agricultural civil partnership Mario Mercado e Hijos, went to Mayaguez and at the domicile of Mr. Rafael Barleta, on the road from Mayaguez to Guanajibo barrio, within the municipal district of Mayaguez, Puerto Rico, served personally notice on Mrs. Elvira Olivieri Commins, and, in her presence and on even date, requested her, after having read fully and aloud the foregoing instrument, having delivered personally to her a true and faithful copy of the same and of this Notarial Act, pursuant to the terms of said Notarial Act of Demand, to proceed to execute a lease in favor of the partnership Mario Mercado e Hijos under the same terms and conditions stated in deed No. 40, executed on March 9, 1937, before notary Luis Lopez de Victoria, concerning the Juanita estate described in the said Notarial Act of Demand, and, as regards the four parcels of the estate Indios also described in the aforesaid Notarial Act of Demand, to proceed to subrogate the partnership Mario Mercado e Hijos to the place and priority at present enjoyed by the purchasers thereof, that is, Mrs. Hazel Kelly Lluberas and her husband Manuel Francisco Lluberas Pasarell, Mrs. Antonia Lluberas Pasarell, widow of Armstrong; Dona Rosa Elena Lluberas Pasarell; Mrs. Graciela Lluberas Pasarell, married to Mr. Antonio Valenti Maestre; Mrs. Celia Lluberas Pasarell, married to Mr. Emilio Blasini Totti and Dona Raquel Lluberas Pasarell.

I further advised Mrs. Elvira Olivieri Commins that I had in my possession the sum of $40,000.00 to pay the aforesaid purchasers the amount paid by them for the said parcels which make up the estate known as Indios and that I had also in my possession

the further sum of $2,000.00 to cover any justified disbursements made by Mrs. Elvira Olivieri Commins regarding the sale of the aforesaid estates Indios and Juanita.

In answer to the above request made by me, in my capacity as notary, in behalf of the partnership Mario Mercado e Hijos, Mrs. Elvira Olivieri Commins stated to me as follows: "As the mortgage conveyed by the partnership Mario Mercado e Hijos to the Heirs of Mr. Jose Tous Soto had been cancelled, I was no longer subject to any obligation towards the said partnership Mario Mercado e Hijos." As said Mrs. Elvira Olivieri Commins refused to receive the aforesaid amount of $40,000.00 and to execute the proper deed of conveyance of said sale and of such lease in favor of the partnership Mario Mercado e Hijos, I told her that there would be brought in the District Court for the Judicial District of Ponce, Puerto Rico, the proper action of conventional redemption and other particulars, and likewise I told her that such sum of $40,000.00 would be deposited in the office of the clerk of the District Court of Ponce, and as she refused to sign the present Notarial Act of Demand, I, the notary, proceed to sign the same in the presence of the witnesses, who also signed, Mr. Ulises Petrilli and Mr. Felix Neri Vazquez, to all of which, I, the notary, certify.

(Sgd.) U. PETRILLI.
F. NERI VAZQUEZ.

Signed, signeted, sealed and paraphed:

Pedro M. Porrata.

Service of demand upon Mr. Manuel Francisco Lluberas Pasarell and his wife Mrs. Hazel Kelly Lluberas, in his own behalf and as the attorney-in-fact of his sisters: Dona Antonia Lluberas Pasarell, Dona Rosa Elena Lluberas Pasarell, Dona Graciela Lluberas Pasarell, Dona Celia Lluberas Pasarell, and her husband Mr. Emilio Blasini Totti and Dona Raquel Lluberas Pasarell.

In the city of Yauco, Puerto Rico, Island of Puerto Rico, and at 10:30 P.M., on April 6, 1937—

I, Pedro M. Porrata, attorney and notary public, with my domicile, residence and office in the city of Yauco (*sic*), and in accordance with the foregoing notice of demand, for which I was commissioned by Mr. Mario Mercado y Riera in his capacity as assistant-manager of the agricultural civil partnership Mario Mercado e Hijos, went to Yauco, Puerto Rico, and at the domicile of Mr. Manuel Francisco Lluberas Pasarell, and his wife, Mrs. Hazel Kelly Lluberas, at "25 de Julio" street of said city of Yauco, Puerto Rico, and, in their presence and on even date, personally requested them, and I further personally requested Mr. Manuel Francisco Lluberas Pasarell in his capacity as attorney-in-fact of his sisters Dona Antonia Lluberas Pasarell, Dona Rosa Elena Lluberas Pasarell, Dona Graciela Lluberas Pasarell, Dona Celia Lluberas Pasarell and her husband Emilio Blasini Totti, and Dona Raquel Lluberas Pasarell, having first read fully and aloud the foregoing instrument, having delivered personally to them a true and faithful copy of the same and of this Notarial Act, by virtue of the terms of said Notarial Act of Demand, to proceed to execute, upon receipt of the sum of $40,359.50 made up as follows: $40,000.00 as the purchase price paid by them to Mrs. Elvira Olivieri Commins; $200.00 as notarial fees of the said deed of sale; $20.00 for a certified copy, including internal revenue stamps; $89.50 as registry's fees for the record thereof in the Registry of Property of Ponce, and $50.00 for any other disbursement that might have been made by them on account of said transaction, or to cover any error that might have been made by the partnership Mario Mercado e Hijos in estimating the whole sum, the proper deed of conveyance of the property sold by Mrs. Elvira Olivieri Commins, as evidenced by deed of sale No. 40 of March 9, 1937, executed before notary Luis Lopez de Victoria, of the estates mentioned in said Notarial Act of Demand.

I further requested Mr. Manuel Francisco Lluberas Pasarell to proceed, upon delivery to him of the sum of $5,000.00, to transfer to the partnership Mario Mercado e Hijos the mortgage credit for said amount constituted by Mrs. Elvira Olivieri Commins to Mr.

Manuel Francisco Lluberas Pasarell regarding the "Juanita" estate, as evidenced by deed No. 30 of February 25, 1937, and deed No. 40 of March 9, 1937, both executed before notary Luis Lopez de Victoria, which total sum of $45,359.50, I produce and tender to them in legal currency of the United States of America.

To this demand, served by me on them, they stated as follows:

I, Manuel Francisco Lluberas Pasarell, want to state that I am not the attorney-in-fact of my sisters Dona Antonia, Dona Rosa Elena, Dona Graciela, Dona Raquel and Dona Celia Lluberas Pasarell and her husband Emilio Blasini Totti, for the purpose to take action in their behalf in connection with the service of demand made on them; and further, that both in my behalf and in behalf of my wife, Dona Hazel Kelly Lluberas, I do not consent to the redemption because in our opinion Mario Mercado e Hijos is not entitled to the redemption which they seek to exercise.

And as the spouses Mr. Manuel Francisco Lluberas Pasarell and Mrs. Hazel Kelly Lluberas refused to take the $45,359.50 and to execute the proper instruments assigning thereby the deeds of sale and mortgage to Mario Mercado e Hijos, I informed them that there would be brought in the District Court for the Judicial District of Ponce, Puerto Rico, the proper action of conventional redemption and other particulars and I likewise informed them that said sum of $45,359.50 will be deposited in the office of the clerk of the District Court for the Judicial District of Ponce, at the disposal of the above parties, and Mr. Manuel Francisco Lluberas Pasarell therefore signed the present demand before the witnesses who also signed, and I, the notary, signed the same in the presence of said witnesses, Mr. Ulises Petrilli and Mr. Felix Neri Vazquez, to all of which, I, the notary, certify.

At this stage, and before proceeding to sign, the parties want to state that in answer to questions from the undersigned notary, Mr. Manuel Francisco Lluberas Pasarell stated as follows:

Q. "In regard to the representation, are you or are you not empowered by your sisters?

A. "I refuse to answer.

Q. "Could you tell us whether when appearing at the execution of deed No. 40, executed on March 9, 1937, before notary Luis Lopez de Victoria, you had it?

A. "I refuse to answer."

I, the undersigned notary, Again Attest.

(Sgd.) M. FRANCISCO LLUBERAS.
HAZEL KELLS LLUBERAS.
U. PETRILLI.
F. NERI VAZQUEZ.

Signed, signeted, sealed and paraphed:

Pedro M. Porrata.

Service of Demand Upon Mrs. Celia Lluberas Pasarell de Blasini.

In the town of Guanica, Island of Puerto Rico, at 10:00 A.M. of April 7, 1937.

I, Pedro M. Porrata, attorney and notary public, with domicile, residence and office in the city of Ponce, and pursuant to the foregoing demand, for which I was commissioned by Mr. Mario Mercado y Riera, as assistant-manager of the agricultural civil partnership Mario Mercado e Hijos, went to the town of Guanica and called at the domicile of Mrs. Celia Lluberas Pasarell, facing the Guanica Bay and being her present, in the same hour and date, personally requested her, after having read aloud the present deed and having delivered to her a true and faithful copy thereof and of this Demand, conformable to the terms of said Notarial Act of Demand, to proceed to execute, as far as she was concerned, upon receipt thereof the sum of $40,359.50, distributed as follows: $40,000.00 as the purchase price paid by her and the other purchasers of the parcels of land making up the estate Indios to Mrs. Elvira Olivieri Commins; $200.00 as notarial fees of the said deed of sale; $20.00 for her certified copy, including internal revenue stamps and $89.50 as fees of the record thereof in the Registry of Property and $50.00 to cover any other dis-

bursement that might have been made by her in connection with the said deals of sale of the four parcels which were parts of the estate known as Indios and with the lease of the estate known as Juanita, or for covering any error that might have been incurred by the partnership Mario Mercado e Hijos in determining the total amount, the proper deed of transfer of the deed of sale in her favor, for her share of the estates bought from Mrs. Elvira Olivieri Commins, as evidenced by deed No. 40, executed on March 9, 1937, before notary Luis Lopez de Victoria. Moreover, I insisted with said Mrs. Celia Lluberas Pasarell de Blasini that the partnership Mario Mercado e Hijos is ready and in a position to assume all and every one of the obligations personally assumed by her, as the lessee of the estate known as Juanita in the contract of lease executed before notary Luis Lopez de Victoria on March 9, 1937, and that, in turn, the partnership Mario Mercado e Hijos is ready to reimburse all the expenses incurred by said Mrs. Celia Lluberas Pasarell in the preparation of the papers required for such lease. That, likewise, the partnership Mario Mercado e Hijos is ready, and has furnished me with sufficient funds for the purpose of paying on the spot the amount paid by her in the aforesaid purchase of the parcels included in the estate known as "Indios", showing her again and counting in her presence, the sum of $42,000.00, which I had on me in legal tender of the United States of America, and counting, moreover, in her presence, the further sum of $5,000.00, which I also had with me, to be delivered to Mr. Manuel Francisco Lluberas Pasarell and to Mrs. Hazel Kelly Lluberas in the event that said people were ready to consent to the subrogation of the aforesaid partnership Mario Mercado e Hijos, as mortgagee, in the mortgage of $5,000.00, which the said Mr. Manuel Francisco Lluberas Pasarell and Mrs. Hazel Kelly Lluberas hold at present upon the said estate known as "Juanita", as evidenced by deed duly recorded in the Registry of Property.

Having served Mrs. Celia Lluberas Pasarell de Blasini with the present Notice of Demand, she stated as follows: "My

husband attends to my private business and any answer from him to this Notice of Demand is satisfactory to me and which I ratify beforehand."

Mrs. Celia Lluberas Pasarell de Blasini having expressed her will to me, and relying on the full power of her husband to act in her behalf and having refused to take the said sum of $40,359.50, or the portion corresponding to her of the purchase price paid by her and the other purchasers for the parcels which were parts of the estate Indios, and having also declared that she is not at all interested in the mortgage lien of $5,000.00 encumbering the estate Juanita, and having, moreover, refused therefore to execute the proper deed of conveyance of the parcels which form part of the estate Indios, described in the Notarial Act of Demand, and of the assignment of the lease regarding the estate Juanita, I advised her that in case of refusal to execute the aforesaid deed, the partnership Mario Mercado e Hijos will bring in the District Court for the Judicial District of Ponce, Puerto Rico, the proper action of conventional redemption and other particulars, and I likewise advised her that said sum of $40,359.50 and the further sum of $5,000.00 concerning the mortgage lien upon the estate Juanita, would be deposited in the office of the clerk of the District Court for the Judicial District of Ponce, Puerto Rico, at the disposal of the interested parties, and said Mrs. Celia Lluberas Pasarell having refused to sign the present Notice of Demand, I, the notary, proceeded to sign the same in the presence of the witnesses, who also signed, Mr. Felix Gonzalez and Mr. Armando Ramirez, to all of which, I, the notary, certify.

At this stage and before signing, I again requested Mrs. Celia Lluberas Pasarell de Blasini to execute a deed conveying, as to her share, to the partnership Mario Mercado e Hijos, the lease of the estate known as Juanita constituted by public deed No. 41 of March 9, 1937; and the sale deed of the four parcels of the estate Indios described in the Notarial Act of Demand, upon payment, by the partnership Mario Mercado e Hijos, of the amount paid by the same and of the notarial fees, I told her again that in the

event of refusal, an action would be brought, depositing in the District Court for the Judicial District of Ponce, Puerto Rico, the sum of $45,359.50, and she again answered that it could not be, and I, the notary, certify again.

(Sgd.) FELIX GONZALEZ.
ARMANDO RAMIREZ.
PEDRO M. PORRATA.

(Signed, signeted, sealed and paraphed.)

Service of Demand Upon Mr. Emilio Blasini y Totti.

In the city of Yauco, Puerto Rico, Island of Puerto Rico, at 3:15 of April 7, 1937, I, Pedro M. Porrata, attorney and notary public, with domicile, residence and office in the city of Ponce, Puerto Rico, and in accordance with the foregoing request made to me by Mr. Mario Mercado y Riera, as assistant-manager of the agricultural civil partnership Mario Mercado e Hijos, went to the town of Yauco and called at the residence of Mr. Luis Lopez de Victoria, in the presence of Mr. Emilio Blasini Totti, who was there, I personally demanded of him on this same date, having first read aloud and fully the foregoing Notarial Act and having delivered him a true and faithful copy thereof and of this demand, to proceed to execute, in accordance with the terms of said Notarial Act of Demand and upon receipt of the sum of $40,359.50, which I now produce and tender to him in legal currency of the United States of America, the proper assignment of the deed of sale executed to him by Mrs. Elvira Olivieri Commins, as evidence by deed No. 40 of March 9, 1937, executed before notary Luis Lopez de Victoria, regarding the properties mentioned in such deed. I also requested said Mr. Emilio Blasini Totti, in his own behalf and in that of his wife, to proceed to assign to Mario Mercado e Hijos the contract of lease which by deed No. 41 of March 9, 1937, Mrs. Elvira Olivieri Commins, as lessor, executed before the aforesaid notary in favor of the above lessee herein served and of his wife regarding the property described in the aforesaid deed and known as Juanita. In answer to the present

Demand served by me on him, in his own behalf and in that of his wife, pursuant to the latter's wish expressed when she was served by me with this Demand, he stated that he does not consent to such redemption because in his opinion Mario Mercado e Hijos is not entitled to the redemption sought.

Q.—"Is this answer to be understood therefore as applying to the lease of the Juanita estate as well as to the sale of the parcels making up the estate Indios? *A.*—Yes."

Upon the refusal of the spouses Mr. Emilio Blasini Totti and Mrs. Celia Lluberas Pasarell to take the said sum of $40,359.50 and to execute the proper assignment of said contract of sale and said lease to the partnership Mario Mercado e Hijos, I informed them that there would be brought in the District Court for the Judicial District of Ponce, Puerto Rico, the proper action of conventional redemption regarding the sale and the lease and other particulars, and I also informed them that the total of said amount would be deposited in the office of the clerk of the District Court of Ponce, at the disposal of the parties so served.

Upon their refusal to sign this Service of Demand, I, the notary, proceed to sign the same in the presence of the witnesses, who also sign: Mr. Francisco Brandi and Mr. Rafael F. Vidal, to all of which, I, the notary, certify. At this very moment, I, the notary, repeat the said demand and receive the same answer, to which I again certify.

(Sgd.) RAFAEL F. VIDAL.
FRANCISCO BRANDI.

Signed, signeted, sealed and paraphed:

Pedro M. Porrata.

There are affixed thereto and cancelled the proper internal revenue stamps.

This is a true and faithful copy of its original to which I refer and which, under the number indicated on top, is on file in the current protocol of public instruments in this my notary office.

In witness whereof and at the request of Mr. Mario Mercado Riera, I issue the present copy, which I sign, signet, paraph and seal in Ponce, P.R., on the same day, month and year of its execution, that is, on this the 7th day of April, 1937.

(Sgd.) Pedro M. Porrata.

(There is affixed hereto and cancelled a $0.50 internal revenue stamp and all its pages are stamped with the notarial seal.) Its cover page contains the following legend: "Attorney Pedro M. Porrata—Attorney and Notary Public—No. 7—Notarial Act of Demand—Executed by Mario Mercado Riera on 193 . Ponce, P. R."

EXHIBIT L OF THE PLAINTIFF.

In the District Court for the Judicial District of Ponce, Puerto Rico. Mario Mercado e Hijos, Plaintiff *v.* Elvira Olivieri Commins, Manuel Francisco Lluberas Passarell and his wife Hazell Kelly Lluberas, Antonia Lluberas Passarell, Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valenti Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti, and Raquel Lluberas Passarell, defendants. Civil Case No. 310. *In re:* Deposit of Money in Court.

COMPLAINT.

To the Honorable Court:

Now comes the plaintiff herein through its undersigned counsel before this Honorable Court and as its cause of action respectfully alleges:

1.—That the plaintiff, "Mario Mercado e Hijos", is an agricultural civil partnership with its domicile in Ponce, Puerto Rico.

2.—That the defendants are all of them above 21 years of age and domiciled as follows: Elvira Olivieri Commins in Mayaguez, Puerto Rico; Manuel Francisco Lluberas Passarell and his wife Hazell Kelly Lluberas and Antonia Lluberas Passarell in Yauco; Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and

her husband Antonio Valenti Maestre, and Raquel Lluberas Passarell in the City of New York, United States of America, and Celia Lluberas Passarell and her husband Emilio Blasini Totti in Ponce, Puerto Rico.

3.—That by public deed No. 13, executed on March 23, 1932, before notary Fernando Zapater Martinez, who acted in the place of notary Jose Tous Soto, recorded in the Registry of Property of Ponce, of which paper a literal copy is attached to this complaint and made part thereof, Mrs. Elvira Olivieri Commins executed and subscribed four promissory notes payable to holder by endorsement and dated March 23, 1932, the first three respectively in the sum of Ten Thousand Dollars as principal, Two Thousand Seven Hundred Dollars for interest thereon and Five Hundred Dollars for costs, expenses, disbursements and attorney's fees, and the fourth in the sum of Eleven Thousand Two Hundred and Fifty-Six Dollars and Eighty-Nine Cents as principal, Three Thousand Dollars for interest thereon and Five Hundred Dollars for costs, disbursements and attorney's fees, all of which to mature on March 23, 1939.

4. That in order to secure the above four promissory notes, defendant Mrs. Elvira Olivieri Commins by said deed No. 13 of March 23, 1932, executed before notary Mr. Fernando Zapater Martinez, who acted in the place of notary Jose Tous Soto, executed a voluntary mortgage on her undivided joint half interests in the following estates:

"Number One:—A piece of rural property known as Juanita lying in the Pueblo and Quberada barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the Rufina plantation,

belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said Rufina plantation; on the west by land of the San Rafael plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to Piedras Blancas barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Number Two:—A piece of rural property known as Los Indios lying in the Indios barrio within the municipal district of Guayanilla with an area of 430 cuerdas equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Company and by mangroves of the maritime zone; on the south by the Yauco river and by land of the Mercedes plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez."

5.—That in the third paragraph of the body of the said deed, Mrs. Elvira Olivieri Commins acknowledged to be indebted to the partnership Mario Mercado e Hijos in the sum of $41,256.89 arising from a liquidated current account at the time of the execution of the aforesaid deed, and in payment of which defendant

Mrs. Elvira Olivieri Commins endorsed and delivered to the partnership Mario Mercado e Hijos the four mortgage notes mentioned in paragraph 3 of the complaint and received and accepted by the latter.

6.—That defendant Mrs. Elvira Olivieri Commins and the partnership Mario Mercado e Hijos, by means of said deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez who acted in the place of notary Jose Tous Soto and as stated on its seventh and eleventh clauses, literally agreed the following:

"Seventh:—Option to Purchase and Sell and to Lease:—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee.

"Eleventh:—The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force."

7.—That by public deed No. 23 of May 9, 1933, executed before the aforesaid notary Fernando Zapater, the partnership

Mario Mercado e Hijos conveyed to the Heirs of Jose Tous Soto, made up of Belen Gonzalez de Tous, Belen Maria, Gladys, Jorge, Hector, Jose, Luz-Belen, Ana-Rosa, Celia and Alicja Tous y Gonzalez, the amount of the aforesaid mortgage credit of $41,256.89, and interest thereon not yet accrued, through the proper endorsement and delivery by the plaintiff to the aforesaid heirs of the four mortgage credits hereinbefore described.

8.—That at the time of the said conveyance of the four mortgage credits above mentioned to the Heirs of Jose Tous Soto, plaintiff Mario Mercado e Hijos stipulated with said heirs to reserve and it did reserve to itself the right of option to sell and repurchase as agreed upon by defendant Elvira Olivieri Commins and the plaintiff, pursuant to clause 7 hereinbefore transcribed of said deed No. 13 of March 23, 1932, before notary Fernando Zapater Martinez, as substitute of Jose Tous Soto.

9.—That by public deed No. 33 of August 20, 1936, executed before notary Tomas Paz Ruiz, recorded in the Registry of Property of Ponce, defendant Elvira Olivieri Commins and her sister Santia Olivieri Commins, as the sole joint owners, proceeded to the actual partition of the estates described in paragraph 4 of this complaint, there being allotted to said defendant Elvira Olivieri Commins, in satisfaction of her undivided joint interests in the said estates the parcels of land and condominiums described as follows:

One:—The whole estate known as Juanita described in No. 1 of the fourth averment of this complaint, with an area of 81.77 cuerdas of flat land and 378.91 cuerdas of hilly land.

Two:—Full ownership of a rural estate—a parcel of land containing 79.46 cuerdas, equivalent to 31 hectares, 23 ares, 8 centiares, 79 miliares, lying in the Indios barrio within the municipal district of Guayanilla, which are subdivided in the following five parcels, which, according to the plat of the survey made by engineer Juan Herminio Sanchez Diaz on

December 5, 1935, are marked as follows:—Parcel "A" with an area of 41.26 cuerdas known by the name of Cupey of flat land planted to sugar canes; Parcel "B" containing 4 cuerdas, of flat land, planted to sugar canes; Parcel "C" having 20.52 cuerdas of semiflat land at present planted to lesser crops; Parcel "D" containing 1.78 cuerda of semiflat land planted to lesser crops; and Parcel "E" containing 12 cuerdas of semiflat land planted to lesser crops. The whole tract is bounded as follows: on the north by land of Santia Olivieri, the track of the American Railroad Company and from the west angle of Parcel "D" by the Municipal road leading from Guayanilla to the Boca barrio; on the south by land of Arturo Lluberas and nephews, by the Yauco river, by a 0.30-cuerda undivided parcel containing the pump and belonging to Santia and Elvira Olivieri Commins, and with land of Santia Olivieri Commins; on the east by land of Santia Olivieri, and on the west by land of Mariano Lugo, by land of Ramon Ramirez, and by an old road which divided land of Ramon Lluberas, Luis Cervoni, Dolores Lopez and land of Luis Cervoni and on the southwest land of Arturo Lluberas and nephews. The fact is recorded that all along the estate there is a private road belonging to Santia and Elvira Olivieri, 6-meter wide, which proceeds along the west side of Parcel "B" as far as the undivided 0.30-cuerda parcel where the irrigation pump stands. Within this tract, but enclosed by said Parcel "C" there is a small parcel of land jointly owned by Santia and Elvira Olivieri with an area of 0.25 cuerda and there is built thereon a small house with a concrete foundation for a pump. And it is hereby explained that the aforesaid parcels marked letters "E" and "D" are separated, the former, partly on its east side, by the road leading from Guayanilla to Boca barrio and the latter by the railroad track, both in connection with Parcel "C", and the former is also separated in connection with the latter by the said railroad track. (sic).

Three:—Full ownership of a portion or parcel of saltpeter land lying in the Indios barrio of the municipal district of Guayanilla and bounded: on the north by land of Mario Mercado e Hijos; on the south with a cano within the land of Santia Olivieri; on the east by the Caribbean Sea and on the west by a 6-meter wide road, three meters of which is part of this parcel and the other three meters part of the parcel of land belonging to Santia Olivieri. Its area is 41.99 cuerdas, equivalent to 16 hectares, 50 ares, 37 centiares and 7 miliares of saltpeter land.

Four:—A $50.00 Undivided Half Interest in the following $100.00-worth parcel and a $175.00-worth interest in the value of the pump standing on said parcel, which pump was appraised at $700.00, described as follows; "Undivided parcel of land with an area of 0.30 cuerda, equivalent to 11 ares, 79 centiares and 12 miliares with a small house thereon fenced and roofed with galvanized-iron, with a steam pump with every accessory and pipes for pumping water from the Yauco river for the irrigation of the estates belonging to Santia and Elvira Olivieri, situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north by land belonging to Elvira Olivieri Commins; on the south by the Yauco river; on the east by land belonging to Santia Olivieri Commins and on the west by land belonging to Elvira Olivieri Commins."

Five:—A $50.00 undivided half interest in the following $100.00-worth parcel: Rural: an undivided parcel of land measuring 0.25 cuerda, equivalent to 9 ares, 82 centiares and 60 miliares, possibly destined to have installed thereon a pump for drawing water from adjacent springs, with a cement foundation with a small house roofed and fenced with galvanized iron, and pipes. This parcel of land is situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows; on the north, west and east by Parcel "C" of the estate belonging to Elvira Olivieri Com-

mins; and on the south by Parcel "A" known as Cupey from the same estate of Elvira Olivieri Commins.

10.—That in the said deed of partition of jointly owned property, mentioned in the foregoing paragraph, there appeared plaintiff Mario Mercado e Hijos and gave its consent to the said partition of jointly owned property.

11.—That prior to March 8, 1937, and on the best information and belief of plaintiff, the aforesaid defendant Elvira Olivieri Commins, as vendor, and the other defendants, as purchasers, while the option clause inserted in the mortgage deed of March 23, 1932, mentioned in paragraph 3 of this complaint was in force, conspired among themselves with the deliberate purpose of defrauding the plaintiff partnership Mario Mercado e Hijos of its right to exercise the right of redemption as agreed in clause 7 of the aforesaid deed No. 13 dated March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, entered into a contract of sale of the estates and condominiums already described in paragraph 9 of this complaint, and marked with the numbers 2, 3, 4 and 5, the purchase price being $40,000.00, all the defendants having notice of the right of option held by plaintiff Mario Mercado e Hijos at the time of such sale in regard to said holdings.

12.—That on the day following, that is, March 9, 1937, said defendant Elvira Olivieri Commins, as vendor, and the other defendants, as purchasers, embodied in a public deed executed before notary Luis Lopez de Victoria the contract of sale entered into between them, and to which mention has already been made, said deed of sale having been presented for record in the Registry of Property of Ponce on March 10, 1937, and recorded on March 23, 1937.

13.—That neither defendant Elvira Olivieri Commins, nor any of the other defendants, nor anybody else in their behalf advised plaintiff Mario Mercado e Hijos prior to the time when the former agreed upon and executed the said contract of sale of the estates

and condominiums already described, or subsequent to such sale by registered letter or in any other way, the offer to buy for $40,000.00 the said properties made to said defendant Elvira Olivieri Commins by the other defendants, the partnership Mario Mercado e Hijos being informed of the execution of such contract of sale on March 10, 1937, by defendant Manuel Francisco Lluberas.

14.—That plaintiff, should it have been advised as to the said offer to buy prior to the execution of such sale, would have been ready, as it is now ready, to pay for the properties described under Nos. 2 and 3 of paragraph 9 of this complaint and for the condominiums described under Nos. 4 and 5 of said paragraph, the same purchase price paid by the defendant purchasers to the defendant vendor for the properties above described, to wit: $35,000.00 for the immovable described in No. 2; $1,000.00 for the parcel described under No. 3; and $2,000.00 for each of the condominiums described in Nos. 4 and 5 of said ninth paragraph of this complaint as well as all other necessary disbursements made by the defendants on account of such sale. Plaintiff alleges that it is ready to comply with each and everyone of the terms imposed on defendant purchasers by defendant vendor, by virtue and as the result of such contract of sale entered into between them in connection with the aforesaid holdings.

15.—That by public deed No. 30 of February 25, 1937, modified by deed No. 40 of March 9, 1937, both executed before notary Luis Lopez de Victoria, Mrs. Elvira Olivieri Commins constituted a voluntary mortgage in favor of Mr. Manuel Francisco Lluberas y Pasarell for $5,000.00 as principal, bearing interest at 6% annually, plus the sum of $200.00 for costs, expenses, disbursements and attorney's fees in case of foreclosure of immovable No. 1, described in paragraph 4 of this complaint, such mortgage lien to mature on February 25, 1942.

16.—That the plaintiff demanded by Notarial Act of defendants Mrs. Elvira Olivieri Commins, Mr. Manuel Francisco Lluberas Pasarell and his wife, Hazell Kelly Lluberas, Dona Antonia Lluberas Pasarell, Dona Graciela Lluberas Pasarell and her hus-

band Antonio Valenti Maestre, Mrs. Celia Lluberas Pasarell and her husband, Emilio Blasini Totti, and Dona Raquel Lluberas Pasarell, pursuant to deed No. 9, executed before notary Pedro M. Porrata on April 6, 1937, of which a certified copy is enclosed herewith and made part of this complaint, to reconvey to the plaintiff the estates and condominiums hereinbefore described in paragraph 9 of the present complaint and marked Nos. 2, 3, 4 and 5, upon payment by said plaintiff to said defendants of the following amounts which were tendered to them by the undersigned notary Pedro M. Porrata at the time of serving such Demand, in legal currency:

Amount of the purchase price paid by the defendants Lluberas Pasarell to Elvira Olivieri Commins for the estates and condominiums mentioned in paragraph 9, under Nos. 2, 3, 4 and 5	$40,000.00
Amount disbursed for the deed of sale	200.00
Internal revenue stamps for the copy	20.00
Recording thereof in the Registry of Property	89.50
Necessary disbursements unknown to plaintiff that may have been incurred by defendants	50.00
	$40,359.50

17.—That plaintiff likewise, by means of the Notarial Act of Demand mentioned in the foregoing allegation, and through notary Pedro M. Porrata, tendered to defendant Mrs. Elvira Olivieri Commins the sum of $5,000.00 in payment of the mortgage constituted by her in favor of defendant Mr. Manuel Francisco Lluberas Pasarell mentioned in the foregoing paragraph 15.

18.—That the aforesaid defendants so served, refused to take the amount mentioned in the foregoing two paragraphs of this complaint, and likewise, defendant Mr. Manuel Francisco Lluberas Pasarell refused to execute in favor of the plaintiff the proper assignment of his mortgage credit upon the estate Juanita described in paragraph 9 of this complaint under No. 1, and like-

wise, defendants Lluberas y Pasarell refused to execute the deed of conveyance in favor of plaintiff, in connection with the estates described and marked 2, 3, 4 and 5 in paragraph 9 of the present complaint, the undersigned notary Pedro M. Porrata having advised them in the name of the plaintiff partnership that the amount above mentioned would be deposited in legal tender of the United States in this Court, at the disposal of the aforesaid defendants.

By Virtue of the Foregoing we pray the Court to enter judgment with the following pronouncements:

(a) Declaring that the present deposit has been properly made.

(b) Adjudging such defendants as oppose this complaint to pay the costs, expenses, disbursements and attorney's fees.

Ponce, Puerto Rico, April 7, 1937.

PEDRO M. PORRATA,
FELIX OCHOTECO, Jr.;
Per: (Sgd.) Felix Ochoteco, Jr.,
Counsel for plaintiff.

OATH

I, Mario Mercado Riera, duly sworn, hereby declare:

That the above is my name, that I am of age, married, a resident of Ponce, Puerto Rico.

That I am assistant-manager partner of plaintiff Mario Mercado e Hijos, an agricultural civil partnership, domiciled in Ponce, Puerto Rico.

That each and every one of the facts alleged in the present complaint are known to me personally and the same are true except those alleged in paragraph 11 of said complaint which I believe to be true on information and belief.

Ponce, Puerto Rico, April 7, 1937.

(Sgd.) Mario Mercado, Jr., Affiant.

Affidavit No. 13783.

Sworn to and subscribed before me by Mario Mercado Riera, of age, married, assistant-manager and partner of the agricultural civil partnership Mario Mercado e Hijos, whom I know personally.

Ponce, Puerto Rico, April 7, 1937.

(Sgd.) Rafael Atiles Moreu,
Notary Public.

(There is affixed hereto and cancelled a $0.25 internal revenue stamp and the notarial seal of notary Rafael Atiles Moreu, and likewise, there are affixed at the top of this complaint and cancelled a $5.00 internal revenue stamp and the Bar Association Stamp. The following appears at the top: "Filed April 8, 1937 at 8:20 A.M." There appears here a sort of paraph or signature which is illegible.)

EXHIBIT M OF THE PLAINTIFF.

In the District Court for the Judicial District of Ponce, Puerto Rico. Mario Mercado e Hijos, Plaintiff *v.* Elvira Olivieri Commins, Manuel Francisco Lluberas Passarell and his wife Hazell Kelly Lluberas, Antonia Lluberas Passarell, Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valenti Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti, and Raquel Lluberas Passarell, Defendants. Civil Case No. 310. *In re:* Deposit of Money in Court.

AMENDED COMPLAINT.

To the Honorable Court:

Now comes the plaintiff herein through its undersigned counsel before this Honorable Court and as its cause of action respectfully alleges:

1. That the plaintiff, "Mario Mercado e Hijos", is an agricultural civil partnership with its domicile in Ponce, Puerto Rico.

2. That the defendants are all of them above 21 years of age

and domiciled as follows: Elvira Olivieri Commins in Mayaguez, Puerto Rico; Manuel Francisco Lluberas Passarell and his wife Hazell Kelly Lluberas and Antonia Lluberas Passarell in Yauco; Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio Valenti Maestre, and Raquel Lluberas Passarell in the City of New York, United States of America, and Celia Lluberas Passarell and her husband Emilio Blasini Totti, in Ponce, P. R.

3. That by public deed No. 13 executed on March 23, 1932, before notary Fernando Zapater Martinez, who acted in the place of notary Jose Tous Soto, recorded in the Registry of Property of Ponce, of which paper a literal copy is attached to this complaint and made part thereof, Mrs. Elvira Olivieri Commins executed and subscribed four promissory notes payable to holder by endorsement and dated March 23, 1932, the first three respectively in the sum of Ten Thousand Dollars as principal, Two Thousand Seven Hundred Dollars for interest thereon and Five Hundred Dollars for costs, expenses, disbursements and attorney's fees, and the fourth in the sum of Eleven Thousand Two Hundred and Fifty-Six Dollars and Eighty-Nine Cents as principal, Three Thousand Dollars for interest thereon and Five Hundred Dollars for costs, disbursements and attorney's fees, all of which to mature on March 23, 1939.

4. That in order to secure the above four promissory notes, defendant Mrs. Elvira Olivieri Commins by said deed No. 13 of March 23, 1932, executed before notary Mr. Fernando Zapater Martinez, who acted in the place of notary Jose Tous Soto, executed a voluntary mortgage on her undivided joint half interests in the following estate:

> "Number One:—A piece of rural property known as Juanita lying in the Pueblo and Quebrada barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly

and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the Rufina plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said Rufina plantation; on the west by land of the San Rafael plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to Piedras Blancas barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Number Two:—A piece of rural property known as Los Indios lying in the Indios barrio within the municipal district of Guayanilla with an area of 430 cuerdas equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado, now, Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Company and by mangroves of the maritime zone; on the south by the Yauco river and by land of Mercedes plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez."

5. That in the third paragraph of the body of the said deed, Mrs. Elvira Olivieri Commins acknowledged to be indebted to the partnership Mario Mercado e Hijos in the sum of $41,256.89

arising from a liquidated current account at the time of the execution of the aforesaid deed, and in payment of which defendant Mrs. Elvira Olivieri Commins endorsed and delivered to the partnership Mario Mercado e Hijos the four mortgage notes mentioned in paragraph 3 of this amended complaint and received and accepted by the latter.

6. That defendant Mrs. Elvira Olivieri Commins and the partnership Mario Mercado e Hijos, by means of said deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, who acted in the place of notary Jose Tous Soto and as stated on its seventh and eleventh clauses, literally agreed the following:

> "Seventh: Option to Purchase and Sell and to Lease.—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee.
>
> "Eleventh: The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force."

7. That by public deed No. 23 of May 9, 1933, executed before the aforesaid notary Fernando Zapater, the partnership Mario Mercado e Hijos conveyed to the Heirs of Jose Tous Soto, made up of Belen Gonzalez de Tous, Belen Maria, Gladys, Jorge, Hector, Jose, Luz-Belen, Ana-Rosa, Celia and Alicia Tous y Gonzalez, the amount of the aforesaid mortgage credit of $41,256.89, and interest thereon not yet accrued, through the proper endorsement and delivery by the plaintiff to the aforesaid heirs of the four mortgage credits hereinbefore described.

8. That at the time of the said conveyance of the four mortgage credits above mentioned to the Heirs of Jose Tous Soto, plaintiff Mario Mercado e Hijos stipulated with said heirs to reserve and it did reserve to itself the right of option to sell and repurchase as agreed upon by defendant Elvira Olivieri Commins and the plaintiff, pursuant to clause 7 hereinbefore transcribed of said deed No. 13 of March 23, 1932, before notary Fernando Zapater Martinez as substitute of Jose Tous Soto.

9. That by public deed No. 33 of August 20, 1936, executed before notary Tomas Paz Ruiz, recorded in the Registry of Property of Ponce, defendant Elvira Olivieri Commins and her sister Santia Olivieri Commins, as the sole joint owners, proceeded to the actual partition of the estates described in paragraph 4 of this amended complaint, there being alloted to said defendant Elvira Olivieri Commins, in satisfaction of her undivided joint interests in the said estates the parcels of land and condominiums described as follows:

One: The whole estate known as Juanita described in No. 1 of the fourth averment of this amended complaint, with an area of 81.77 cuerdas of flat land and 378.91 cuerdas of hilly land.

Two: Full ownership of a rural estate—a parcel of land containing 79.46 cuerdas, equivalent to 31 hectares, 23 ares, 8 centiares, 79 miliares, lying in the Indios barrio within the municipal district of Guayanilla, which are subdivided in the

following five parcels, which, according to the plat of the survey made by engineer Juan Herminio Sanchez Diaz on December 5, 1935, are marked as follows:—Parcel "A" with an area of 41.26 cuerdas known by the name of Cupey of flat land planted to sugar canes; Parcel "B" containing 4 cuerdas of flat land, planted to sugar canes; Parcel "C" having 20.52 cuerdas of semiflat land at present planted to lesser crops; Parcel "D" containing 1.78 cuerdas of semiflat land planted to lesser crops; and Parcel "E" containing 12 cuerdas of semiflat land planted to lesser crops. The whole tract is bounded as follows: on the north by land of Santia Olivieri, the track of the American Railroad Company and from the west angle of Parcel "D" by the municipal road leading from Guayanilla to the Boca barrio; on the south by land of Arturo Lluberas and nephews, by the Yauco river, by a 0.30-cuerda undivided parcel containing the pump and belonging to Santia and Elvira Olivieri Commins, and with land of Santia Olivieri and on the east by land of Santia Olivieri, and on the west by land of Mariano Lugo, by land of Ramon Ramirez, and by an old road which divided land of Ramon Lluberas, Luis Cervoni, Dolores Lopez and land of Luis Cervoni and on the southwest by land of Arturo Lluberas and nephews. The fact is recorded that all along the estate there is a private road belonging to Santia and Elvira Olivieri, 6-meters wide, which proceeds along the west side of Parcel "B" as far as the undivided 0.30-cuerda parcel where the irrigation pump stands. Within this tract, but enclosed by said Parcel "C" there is a small parcel of land jointly owned by Santia and Elvira Olivieri with an area of 0.25 cuerda and there is built thereon a small house with a concrete foundation for a pump. And it is hereby explained that the aforesaid parcels marked letters "E" and "D" are separated, the former, partly on its east side, by the road leading from Guayanilla to Boca barrio and the latter by the railroad track, both in connection with Parcel "C", and the

former is also separated in connection with the latter by the said railroad track. (*sic*)

Three: Full ownership of a portion or parcel of saltpeter land lying in the Indios barrio of the municipal district of Guayanilla and bounded: on the north by land of Mario Mercado e Hijos, on the south with a cano within the land of Santia Olivieri; on the east by the Caribbean Sea and on the west by a 6-meter wide road, three meters of which is part of this parcel and the other three meters part of the parcel of land belonging to Santia Olivieri. Its area is 41.99 cuerdas, equivalent to 16 hectares, 50 ares, 37 centiares and 7 miliares of saltpeter land.

Four: A $50.00 Undivided Half Interest in the following $100.00-worth parcel and a $175.00-worth interest in the value of the pump standing on said parcel, which pump was appraised at $700.00, described as follows: "Undivided parcel of land with an area of 0.30 cuerda, equivalent to 11 ares, 79 centiares and 12 miliares with a small house thereon, fenced and roofed with galvanized-iron, with a steam pump with every accessory and pipes for pumping water from the Yauco river for the irrigation of the estates belonging to Santia and Elvira Olivieri, situated in the Indios barrio of the municipal district of Guayanilla and bounded as follows: on the north by land belonging to Elvira Olivieri Commins; on the south by Yauco river; on the east by land belonging to Santia Olivieri Commins and on the west by land belonging to Elvira Olivieri Commins."

Five: A $50.00 undivided half interest in the following $100.00-worth parcel: Rural: an undivided parcel of land measuring 0.25 cuerda, equivalent to 9 ares, 82 centiares and 60 miliares, possibly destined to have installed thereon a pump for drawing water from adjacent springs, with a cement foundation with a small house roofed and fenced with galvanized iron, and pipes. This parcel of land is situated in the Indios barrio of the municipal district of Guayanilla and

bounded as follows: on the north, west and east by Parcel "C" of the estate belonging to Elvira Olivieri Commins; and on the south by Parcel "A" known as Cupey from the same estate of Elvira Olivieri Commins.

10. That in the said deed of partition of jointly owned property, mentioned in the foregoing paragraph, there appeared plaintiff Mario Mercado e Hijos and gave its consent to the said partition of jointly owned property.

11. That prior to March 8, 1937, and on the best information and belief of plaintiff, the aforesaid defendant Elvira Olivieri Commins, as vendor, and the other defendants, as purchasers, while the option clause inserted in the mortgage deed of March 23, 1932, mentioned in paragraph 3 of this amended complaint was in force, conspired among themselves with the deliberate purpose of defrauding the plaintiff partnership Mario Mercado e Hijos of its right to exercise the right of redemption as agreed in clause 7 of the aforesaid deed No. 13 dated March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, entered into a contract of sale of the estates and condominiums already described in paragraph 9 of this amended complaint, and marked with the numbers 2, 3, 4 and 5, the purchase price being $40,000.00, all the defendants having notice of the right of option held by plaintiff Mario Mercado e Hijos at the time of such sale in regard to said holdings.

12. That on the day following, that is, March 9, 1937, said defendant Elvira Olivieri Commins, as vendor, and the other defendants, as purchasers, embodied in a public deed executed before notary Luis Lopez de Victoria the contract of sale entered into between them, and to which mention has already been made, said deed of sale having been presented for record in the Registry of Property of Ponce on March 10, 1937, and recorded on March 23, 1937.

13. That neither defendant Elvira Olivieri Commins, nor any of the other defendants, nor anybody else in their behalf advised

plaintiff Mario Mercado e Hijos prior to the time when the former agreed upon and executed the said contract of sale of the estates and condominiums already described, or subsequent to such sale by registered letter or in any other way, the offer to buy for $40,000.00 the said properties made to said defendant Elvira Olivieri Commins by the other defendants, the partnership Mario Mercado e Hijos being informed of the execution of such contract of sale on March 10, 1937, by defendant Manuel Francisco Lluberas.

14. That plaintiff, should it have been advised as to the said offer to buy prior to the execution of such sale, would have been ready, as it is now ready, to pay for the properties described under Nos. 2 and 3 of paragraph 9 of this amended complaint and for the condominiums described under Nos. 4 and 5 of said paragraph, the same purchase price paid by the defendant purchasers to the defendant vendor for the properties above described, to wit: $35,000.00 for the immovable described under No. 2; $1,000.00 for the parcel described in No. 3; and $2,000.00 for each of the condominiums described in Nos. 4 and 5 of said paragraph 9 of this amended complaint as well as all other necessary disbursements made by the defendants on account of such sale. Plaintiff alleges that it is ready to comply with each and everyone of the terms imposed on defendant purchasers by defendant vendor, by virtue and as the result of such contract of sale entered into between them in connection with the aforesaid holdings.

15. That by public deed No. 30 of February 25, 1937, modified by deed No. 40 of March 9, 1937, both executed before notary Luis Lopez de Victoria, Mrs. Elvira Olivieri Commins constituted a voluntary mortgage in favor of Mr. Manuel Francisco Lluberas y Pasarell for $5,000.00 as principal, bearing interest at 6% annually, plus the sum of $200.00 for costs, expenses, disbursements and attorney's fees in case of foreclosure of immovable No. 1, described in paragraph 4 of this amended complaint, such mortgage lien to mature on February 25, 1942.

16. That the plaintiff demanded, by Notarial Act, of defend-

ants Mrs. Elvira Olivieri Commins, Mr. Manuel Francisco Lluberas Pasarell and his wife Hazel Kelly Lluberas, Dona Antonia Lluberas Pasarell, Dona Graciela Lluberas and her husband Antonio Valenti Maestre, Mrs. Celia Lluberas Pasarell and her husband Emilio Blasini Totti and Dona Raquel Lluberas Pasarell, pursuant to deed No. 9, executed before notary Pedro M. Porrata on April 6, 1937, of which a certified copy is enclosed herewith and made part of this amended complaint, to reconvey to the plaintiff the estates and condominiums hereinbefore described in paragraph 9 of the present amended complaint and marked Nos. 2, 3, 4 and 5, upon payment by said plaintiff to said defendants of the following amounts which were tendered to them by the undersigned notary Pedro M. Porrata at the time of serving such Demand, in legal currency:

Amount of the purchase price paid by the defendants Lluberas Pasarell to Elvira Olivieri Commins for the estates and condominiums mentioned in paragraph 9, under Nos. 2, 3, 4 and 5	$40,000.00
Amount disbursed for the deed of sale	200.00
Internal revenue stamps for the copy	20.00
Recording thereof in the Registry of Property	89.50
Necessary disbursements unknown to plaintiff that may have been incurred by defendants	50.00
	$40,359.50

17. That plaintiff likewise, by means of the Notarial Act of Demand mentioned in the foregoing allegation, and through notary Pedro M. Porrata, tendered to defendant Mrs. Elvira Olivieri Commins the sum of $5,000.00 in payment of the mortgage constituted by her in favor of defendant Mr. Manuel Francisco Lluberas Pasarell mentioned in the foregoing paragraph 15.

18. That the aforesaid defendants so served, refused to take the amount mentioned in the foregoing two paragraphs of this amended complaint, and likewise, defendant Mr. Manuel Francisco Lluberas Pasarell refused to execute in favor of the plaintiff

the proper assignment of his mortgage credit upon the estate Juanita described in paragraph 9 of this amended complaint under No. 1, and likewise, defendants Lluberas y Pasarell refused to execute the deed of conveyance in favor of plaintiff, in connection with the estates described and marked 2, 3, 4 and 5 in paragraph 9 of the present amended complaint, the undersigned notary Pedro M. Porrata having advised them in the name of the plaintiff partnership that the amount above mentioned would be deposited in legal tender of the United States in this Court, at the disposal of the aforesaid defendants.

19. That the plaintiff has simultaneously filed in the office of the clerk of this Court an action for the rescission of sale and other particulars against Mrs. Elvira Olivieri Commins et als., alleging therein the facts above set forth and praying for the rescission of the sale embodied in deed dated March 9, 1937, executed before notary Luis Lopez de Victoria by Mrs. Elvira Olivieri Commins, as vendor, to the other co-defendants, as purchasers, and, moreover, to subrogate the partnership Mario Mercado e Hijos to the rights of the aforesaid defendant purchasers in the estates hereinbefore described and marked 2, 3, 4 and 5 in paragraph 9 of this amended complaint, and lastly to order said defendants (vendor and purchasers) to execute in favor of plaintiff the proper deed of the rescission of the immovables above described and the sale thereof.

20. That for the exclusive purpose of the aforesaid action for the rescission of sale and other particulars which have been filed in the office of the clerk of this Court under a number next to that of the present amended complaint, against the defendants herein upon the facts previously set forth, there is deposited, in connection with the present amended complaint, in the office of the clerk of this Court and at the disposal of the defendants, in legal tender of the United States, the sum of $45,359.50, to cover with it the $40,359.50 and the $5,000.00 referred to in the 16th and 17th paragraphs of the present amended complaint and for the purpose set forth in said allegations.

21. That the deposit of the aforesaid sum of $45,359.50 made by the plaintiff in the office of the clerk of this Court in the above entitled case, in favor of the defendants, is made exclusively for the purpose of enabling the plaintiff to exercise its right of redemption referred to in the complaint of the action for the rescission of the sale filed in the office of the clerk of this Court and has been marked with the number next to the one of the present amended complaint.

By Virtue of the Foregoing the plaintiff respectfully prays this Court to render judgment with the following pronouncements:

(a) Declaring that the deposit of money referred to in the present amended complaint has been properly made; declaring that said deposit of money is conditioned by and subject to the judgment that might finally be rendered in the action of redemption and other particulars filed by the plaintiff in the office of the clerk of this Court against the defendants in the present amended complaint.

(b) Granting to the plaintiff any other remedy congruent with the pleadings and the evidence to be adduced at the proper time, all of which in accordance with law.

San Juan, Puerto Rico, August , 1937.

PEDRO M. PORRATA
FELIX OCHOTECO, Jr.
Per: (Sgd.) Felix Ochoteco, Jr.,
Counsel for plaintiff.

Oath

I, Mario Mercado Riera, duly sworn, hereby declare:

That the above is my name, that I am of age, married, a resident of Ponce, Puerto Rico.

That I am assistant-manager partner of plaintiff "Mario Mercado e Hijos", an agricultural civil partnership, domiciled in Ponce, Puerto Rico.

That each and everyone of the facts alleged in the foregoing amended complaint are known to me personally and the same are

true except those alleged in the eleventh paragraph of said amended complaint which I believe to be true on information and belief.

Ponce, Puerto Rico, August 16, 1937.

(Sgd.) Mario Mercado, Jr., Affiant.

Affidavit No. 6175.

Sworn to and subscribed before me by Mario Mercado Riera, of age, married, assistant-manager and partner of the agricultural civil partnership "Mario Mercado e Hijos", whom I know personally.

Ponce, Puerto Rico, August 16, 1937.

(Sgd.) F. Zapater,
Notary Public.

Certificate of Service of Notice

I hereby certify that on even date and enclosed in a registered envelope I have mailed a true and faithful copy of this amended complaint to attorney Jose Sabater to his postal address in Mayaguez, Puerto Rico, and to attorney Luis Lopez de Victoria, whose postal address is in Yauco, Puerto Rico, and that between the above cities and the city of Ponce there is a regular daily mail service.

Ponce, Puerto Rico, August 16, 1937.

(Sgd.) Pedro M. Porrata.

There is affixed hereto and cancelled a $0.25 internal revenue stamp and the notarial seal duly stamped.

There is the file seal duly stamped evidencing that this amended complaint was filed at 1:38-1/2 P.M. of August 16, 1937.

EXHIBIT N OF THE PLAINTIFF.

Form 14-D. Tel.—Department of the Interior of Puerto Rico—Bureau of Insular Telegraph—Telegram Received at: c3 po ax rs 9:30 A.M. 11 paid—Playa Mayaguez—Jan. 23/36—Mario Mer-

cado e Hijos, Guayanilla. Received proposals through my son-in-law. Will answer next week through Rafael.—ELVIRA OLIVIERI—9:50 A.M.

EXHIBIT O-1 OF THE PLAINTIFF.

Form 14—D Tel.—Department of the Interior of Puerto Rico—Bureau of Insular Telegraph—Telegram Received at: c1 po gh rs 9:45 A.M. 13 paid Mayaguez Feb. 5/37—Mario Mercado e Hijos, Guayanilla.—Dona Elvira has not decided upon the business being still sick. Will let you know day next week.—BARLETA. 10:00 A.M.

EXHIBIT O-2 OF THE PLAINTIFF.

Form 14—D Tel.—Department of the Interior of Puerto Rico—Bureau of Insular Telegraph—Telegram Received at: c2poax rs 12poax rs 10:10 A.M. 3 paid—Mayaguez Feb. 10/37—Jose R. Peralta, Central Rufina, Guayanilla.—Will be there that morning. BARLETA. 10:20 A.M.

EXHIBIT O-3 OF THE PLAINTIFF.

Form 14—D Tel.—Department of the Interior of Puerto Rico—Bureau of Insular Telegraph—Telegram Received at: BIJVNCB 2:15 P.M. 11 Paid—Mayaguez Jan. 14/37—Mr. Jose R. Peralta—Central Rufina, Guayanilla.—Will explain personally reasons for failure to be present. Will be there Monday afternoon without fail. RAFAEL BARLETA—2:20 P.M.

EXHIBIT O-4 OF THE PLAINTIFF.

Form 14—D Tel.—Department of the Interior of Puerto Rico—Bureau of Insular Telegraph—Telegram Received at: c1 po gh rs 9:40 A.M. 3 paid—Mayaguez Feb. 18/37—Jose Peralta, Guayanilla. Will be there tomorrow morning. BARLETA. 10:15 A.M.

EXHIBIT O-5 OF THE PLAINTIFF.

Form 14—D Tel.—Department of the Interior of Puerto Rico—Bureau of Insular Telegraph—Telegram Received at C I PO GH CB 9:30 A.M. Paid—Mayaguez, January 9, 1937.—Jose R. Peralta, Manager Central Rufina, Guayanilla. Had to leave urgently for San Juan. Will be there Monday 4:00 P.M.—RAFAEL BARLETA —11:12 A.M.

EXHIBIT P OF THE PLAINTIFF.

Guayanilla, P. R. 1/14/37—Rafael Barleta, Mayaguez.—We suppose you failed to come yesterday as agreed upon for reasons beyond your control. Please inform us exact date we may expect you. CENTRAL RUFINA.

EXHIBIT Q OF THE PLAINTIFF.

Department of the Interior of Puerto Rico—Bureau of Insular Telegraph—Receiver's No. 4—Time Filed 9:52—Check 11 Pd. —Send the Following Message: Mario Mercado e Hijos, Central Rufina, Guayanilla.—Received proposals through my son-in-law. Will answer next week through Rafael. RAFAEL BARLETA. (This name has been crossed out and there is then the signature of:) ELVIRA OLIVIERI.—Name of Sender: B4JB HD 9:58 A.M. Address: (A rubber stamp has been stamped which reads: "Playa de Mayaguez—Jan. 23, 1937.")

EXHIBIT R OF THE PLAINTIFF.

Rafael Barletta — Manufacturers' representative — Mayaguez, Puerto Rico—Cable Address: "Colombia"—P. O. Box 193—Marina Sta.—December 15/36—Mr. Mario Mercado *hijo*, Guayanilla. My dear friend: In accordance with the conversation had by my son-in-law, Mr. Rafael Barletta, with the manager, Mr. Peralta, regarding my account with attorney Paz, concerning the papers relating to the partition of the parcels Juanita and Indios, you will oblige me by delivering a check in favor of Mr. Rafael

Barletta for $125.00 to be charged to my account in order to settle with attorney Paz. We will both be benefited to have these papers in proper shape. As soon as these holidays are over Don Rafael is going to talk business with you.

I avail myself of this opportunity to wish you and all your family a happy new year.

Thanking you with anticipation, I am

Yours truly,

(Sgd.) ELVIRA OLIVIERI.

Check in favor of Tomas Paz Ruiz to be charged to Elvira Olivieri on account of lease. No. 2058—$125.00

EXHIBIT S OF THE PLAINTIFF.

Cable Adress: "Colombia"—Rafael Barletta—Manufacturers' Representative—Mayaguez, Puerto Rico—P. O. Box 193—Marina Sta.—February 6/37. Messrs. Mario Mercado e Hijos, Guayanilla. (Exh. "S" of the plaintiff admitted over objection) My dear friend:

I confirm my telegram explaining that due to the illness of my mother-in-law I had not yet been able to have a final talk in order to dispatch the pending business. I expect next week to give you a final answer.

Owing to the fact that I have received a lot of goods necessitating payment of duties in the custom house I will ask you as a favor not to cash the check until Tuesday of next week, February 16.

I am very grateful to you for everything and hope to reciprocate. I am,

Yours truly,

(Sgd.) RAFAEL BARLETTA.

EXHIBIT T OF THE PLAINTIFF.

No. 41

CONTRACT OF LEASE

Mayaguez, Puerto Rico, March 9, 1937.

Before Me

Luis Lopez de Victoria, attorney and notary public for Puerto Rico, with my domicile and office in Yauco—

There Appear

As party of the first part: Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, domiciled in Mayaguez, Puerto Rico,—

As parties of the second part: The spouses Mr. Emilio Blasini y Totti and Mrs. Celia Lluberas Pasarell, of age, property owners, domiciled in Ponce, Puerto Rico.

I certify to my personal knowledge of the parties hereto and, as informed by them, to their being of age, married, to their occupations and domiciles. They assure me, and I believe them, to be legally qualified for this execution and by virtue whereof—

They State

Rural Estate

First: That Mrs. Elvira Olivieri Commins owns the following:

Rural: An estate known as "Juanita" lying in the Pueblo and Quebrada barrios of the municipal district of Guayanilla, Puerto Rico, with an area of 81.77 cuerdas of flat land applied to sugar canes and 378.91 cuerdas of wood and pasture land, and a water pump for irrigating said canes and a frame house with the galvanized-iron roof in poor condition. It is bounded on the north by land of the Heirs of Antonio Ramos, of Jesus Rodriguez, of Ricardo Rodriguez, of Dr. Jose Cobian, and of the Heirs of Lugo and a municipal road separating land partly of Mario Mercado e Hijos; on the south by land of Mario Mercado e Hijos and partly by a municipal road separating land of said concern, by land of

Santia de la Cruz de Pacheco, of Catalina Tirado and of Mario Mercado e Hijos; on the east by land of the aforesaid Mario Mercado e Hijos; on the northwest by land of the Heirs of Antonio Ramos and of Joaquin Diaz; and on the west by land of Joaquin Diaz, of Herminia Morales, and the woodland of the San Rafael plantation of the Heirs of Angela and Dario Franceschi; on the southwest by land of Mario Mercado e Hijos. This estate is crossed from south to the northwest by the tracks of the American Railroad Company of Puerto Rico. Its area is 460.68 cuerdas, equivalent to 181 hectares, 6 ares and 57 centiares.

Second: Mrs. Elvira Olivieri Commins acquired the immovable above described by reason of the dissolution of joint ownership, according to deed No. 73, executed on August 20, 1937, in Yauco, before notary Tomas Paz y Ruiz.

Lease

Third: Mrs. Elvira Olivieri Commins hereby leases to Mr. Emilio Blasini Totti the rural estate described in the first paragraph of this deed, with all its annexes, appurtenances, uses, servitudes, irrigation rights and other rights without any restriction whatever, said lease to be subject to the following clauses and terms:

A. Term of Lease. The term of the lease is ten years, which shall begin to run from March 5, 1938 and will expire on March 5, 1948.

B. Rental. The lease rental shall be $3,250.00 per annum payable in twelve monthly installments in advance from March 5, 1938 and so on during the life of this contract. The payment of the monthly installments may be effected by the lessee by certified check in favor of the lessor, mailed to her postal address by registered letter.

C. Out of this rental the lessee shall retain monthly one-twelfth of the amount of interest on the mortgage which encumbers the leased property in favor of Mr. Manuel Francisco Lluberas Pasarell whose rate of interest is 6% annually and whose

principal is the sum of $5,000.00, which mortgage was constituted by deed No. 30, executed on February 25, 1937, before me and modified by deed No. 40, executed on even date before me in Mayaguez, Puerto Rico.

The lessee shall pay the interest on the aforesaid mortgage to the mortgagee out of the sum retained from the rental. In the event of the mortgage being paid before the expiration of this contract of lease, then the lessee shall not retain anything from such rentals.

D. Taxes. The lessee binds himself to pay, besides the lease rents, the taxes upon the leased estate during the life of the present contract of lease.

E. Subleases. The lessee is empowered to sublease the leased property if he saw fit.

F. The lessee binds himself, with the diligence of a good farmer, to keep in good condition the fences and buildings of the leased property, making the necessary repairs for their preservation and endeavoring to keep them in good condition.

G. Improvements. The improvements made on the leased property shall remain for the benefit of its owner. Such improvements include the ratoons of the cane plantations.

H. Woods and Thickets. The lessee shall be entitled to exploit the woods and thickets of the estate, leaving shade trees for cattle and grazing.

I. Privilege. If at the expiration of the present contract there should still be on the estates canes to be cut, the lessee shall be entitled to a term of three months for cutting and carrying away such canes.

J. Disbursements. Any sums disbursed for improvements on the leased property, of whatever kind, as well as those required for obtaining any franchises, in the event that the lessee should seek any, shall be for the exclusive account of the lessee.

K. The lessee is empowered on his own account and at his own risk to seek and obtain an increase of the quota for the leased property, within the plans of the Federal Administration, and any

quota, if any, obtained by the lessee, shall remain for the benefit of the estate in the form in which said quota might exist at the termination of the present contract.

L. Inventory. The lessee or her lawful agents shall have the right to make inventory of all the annexes and appurtenances of the leased property one year prior to the termination of the present contract.

M. Special Stipulation. If on the day set for the payment of the lease rent such payment should not be effected, the lessee shall then notify, by registered letter, the lessor, of his default, and should said lessee fail to effect such payment within thirty days from such notification, the lessor may then proceed to take the proper legal steps.

N. Nonperformance. The nonperformance of any of the terms hereinbefore stipulated may not bring about the rescission of the present contract, but the lessor may be entitled to compensation for any costs, and injuries caused on that account.

N. The parties hereto consent to the recording of this contract in the proper Registry of Property to the prejudice of á third party.

O. The fees of this deed, certified copy and recording in the Registry of Property shall be for the account of the lessee.

Fourth: Mr. Emilio Blasini Totti and his wife Mrs. Celia Lluberas Pasarell become solidarily liable for the performance of all the obligations incumbent upon them by virtue of the present contract.

Fifth: The spouses Mr. Emilio Blasini Totti and Mrs. Celia Lluberas Pasarell consent to the present lease and all the parties hereto consent to the present deed. I, the notary, inform them as to their rights and duties under the law.

It was so executed before the present witnesses, of age, known to me, qualified as such and domiciled in Mayaguez, Puerto Rico, attorney Jose Sabater and Mr. Eduardo Muller.

Having informed them of their right under the law to read the present deed themselves, of which they avail themselves, the

parties hereto ratify its contents and sign the same, together with the witnesses, affixing, moreover, their respective initials to the other folios of this deed, as required by law.

To all of which, I, the notary, Certify.

The parties herein want to state as follows: That in the event of subleasing, the spouses, Mr. Emilio Blasini Totti and Mrs. Celia Lluberas Pasarell, become liable for and solidarily guarantee the lease rent until the termination of the contract. The parties and witnesses having been advised of the further stipulation, they approve the same, to which, I, the notary, Certify again.

(Sgd.) ELVIRA OLIVIERI.
EMILIO BLASINI.
CELIA LL. BLASINI.
JOSE SABATER.
EDUARDO MULLER.

(Signed, signeted, sealed and paraphed:)

Luis Lopez de Victoria.

There are affixed to the original copy and cancelled the proper internal revenue stamps.

This is a true and faithful copy of its original, deed No. 41, executed in Mayaguez, Puerto Rico on March 9, 1937, on file in my protocol of public instruments to which I refer. And at the request of Mr. Emilio Blasini Totti, I issue this copy on the same day of the execution of its original, leaving a note of the issuance of this copy.

(Sgd.) Luis Lopez de Victoria.

(There is affixed hereto the paraph and signet of said notary as well as the notarial seal and the following internal revenue stamps duly cancelled: $3.00 stamp; another $0.50 stamp and two $0.10 stamps. The notarial seal is stamped on all its pages as well as the paraph of the notary and the seal of the Registry of Property.) On the back thereof the following appears: "Cancelled one $0.50 stamp, No. 1 Schedule of Fees" and the $0.50

stamp is cancelled thereon. There is the imprint of a rubber stamp with the following legend: "Presented at 2:30 P.M. of even date for entry on folio 33 of Volume 186 of the Daybook. Ponce, Puerto Rico, March 10, 1937.

The Registrar (Sgd.) Miguel Planellas."

The seal of the Registry of Property is stamped hereon. (Lower down there is the following handwritten note: "This instrument is recorded on the back of folio 167 of Volume 36 of Guayanilla, Estate No. 711 triplicate, Record 16. This estate is encumbered by a lease in favor of the partnership Mario Mercado e Hijos which gave rise to Record 11, and by the mortgage in favor of Manuel Francisco Lluberas which gave rise to Records 14 and 15. Ponce, March 23, 1937.

The Registrar: (Sgd.) Miguel Planellas."

There are cancelled: 2 $10.00 stamps; one $3.00 stamp; another $1.00 stamp and another $0.50 stamp. No. 5 of the Schedule of Fees and Political Code. Dated *ut supra.*

(Sgd.) Miguel Planellas.

(There are affixed hereto and cancelled internal revenue stamps worth $24.50.)

The cover page of the same contains the following legend: "Luis Lopez de Victoria—Attorney and Notary Public—P. O. Box 114—Telephone 47—Copy of Deed No. 41—*In re:* Lease—Executed by Mrs. Elvira Olivieri Commins and the spouses Mr. Emilio Blasini Totti and Mrs. Celia Lluberas Pasarell.—March 9, 1937.—Mayaguez, Puerto Rico.

EXHIBIT U OF THE PLAINTIFF.

STATEMENTS MADE BY MRS. ELVIRA OLIVIERI COMMINS IN ANSWER TO QUESTIONS FROM ATTORNEY PORRATA ON THE OCCASION OF THE CALL MADE AT HER DOMICILE IN MAYAGUEZ.

There were present:

Mr. Ulises Petrilli, Mr. Felix Neri Vazquez, Mr. Jose R. Peralta, Mr. Pastor Mandry and Mr. Gilberto B. Sicardo, stenographer.

Attorney: We are reading to Mrs. Elvira Olivieri Commins the Notarial Act of Demand.

Q. Was the "Juanita" the estate which you lease? *A.* Yes, sir.

Q. Tell me Dona Elvira, when you sold the estate "Indios", were not you demanded to lease the "Juanita" estate to Millo? *A.* When Dona Elena offered me $40,000.00 for the "Indios" estate she asked me to lease her the "Juanita" estate, for the benefit of her daughters, all this as a special concession in the event that she should buy the property. I accepted because in my opinion it was a good business, and as I was almost with the rope to my neck, I was broken, as I could not help it . . . I also had my attorney . . .

Q. Who is your attorney? *A.* Sabater. Always when necessary he advises us.

Q. Cannot you remember whether this contract of sale was executed a month prior to March 9, 1937? *A.* I don't remember whether it was a month or twenty days . . . Well, I had already given my word. You know I am very honest and my word is always made good. In this I take after my father.

Q. Then, when you sold the "Indios" estate, was it on condition that you should lease the "Juanita" estate? *A.* Yes, sir. The "Juanita" estate. I had already given my word.

Q. Could you tell us the name of that person? *A.* Oh! That is my secret. I don't want to mention names.

Q. Could you tell us something further in connection with

said deal? *A.* If you want to know the details of that deal, why don't you go to the Registry?

(At this moment Dona Elvira personally reads clause 7 of the Notarial Act of Demand.)

Q. From that clause you can see that you were bound to notify the partnership Mario Mercado e Hijos in the event that you proceeded to sell said estates. *A.* Yes, indeed. I always preferred him . . . but as I was told that he was not in condition, rather that he was not interested in the property, my only recourse was to sell because I was in financial straights. I thought to send for my son who was in the United States, but as he had just married at that time, I did not want to mar his happiness by bringing him to Puerto Rico and live on an estate.

Q. And you . . .? Did you sell without notifying Mario Mercado regarding the proposition to purchase, as stipulated in this clause? *A.* Well, as I had been told that he was not interested in the property and in those days I had a bronchitis attack, I was in bed, and, moreover, I had already given my word . . .

Q. Who told you that? To whom did you give your word? *A.* Oh, well! That is a secret . . . I don't want to mention names. I was under obligation for the favor that I had received and I will not, for any worldly consideration, let anybody be injured who had done me a great favor.

Q. But Dona Elvira, if you had notified Don Mario regarding said proposal they would have bought the estate from you upon the same terms and conditions. *A.* I don't know. Rafael told me that he had gone to see Don Mario (Don Marito) and that the latter was rude to him, saying that he was not interested in the property and that he should go to till it, a thing of which I would not have thought Don Marito capable, because I always preferred them and I even used to say that I would always prefer him. When told about that I made up my mind to sell the "Indios" estate and I leased the "Juanita" estate as a special condition, otherwise they would not have bought. I hold those people in great esteem and I would not injure them for anything in the

world, and you see, had it not been for the quotas in question, they would have given me $50,000.00. The agreement was to sell one and to lease the other.

Q. And did you not notify the partnership Mario Mercado e Hijos in that respect? *A.* Well, as he did not want it I could not tell him anything . . .

Q. Were you present in all those deals and were you informed as to what was going on in connection with this matter? *A.* Not directly I myself. At that time I was sick, with bronchitis, I was coughing a lot, a very severe coughing, and Rafael took upon himself to do everything.

Q. At what price did you sell? *A.* At $40,000.00 and I repeat that had not it been for those blooming quotas they would have given me $50,000.00.

Q. Was that the sale? *A.* Yes, the sale. We effected the sale and received the $40,000.00 and proceeded to execute the deed; I had to pay for that deed. We needed cash to pay.

Q. And who else intervened in that deal? *A.* I commissioned Chito to act in the matter. He did quite right by me.

Q. Can you not remember more or less when it was agreed to sell the property? *A.* I cannot tell you exactly; it seems to me that it was at the time of Delgado's death. Oh, yes, I remember! It was about that time.

(Dona Elvira personally proceeds in her reading of clause 7 of said Notarial Act of Demand.)

Dona Elvira: I am entitled to be treated with consideration. I am a lady entitled to be treated with consideration.

(At this moment Dona Elvira's son turns up.) (Attorney Porrata explains to him the purpose of his visit.)

Doctor: Mama cannot answer your questions. I am a dentist by profession, I mean to say that I understand very little about your business and the old woman in legal matters does nothing unless she consults our attorney.

Attorney: Well, Dona Elvira, in order to comply with the law and the commission with which I have been charged, would you be

kind enough to tell me what you want me to set down as your answer to this Notarial Act of Demand?

Doctor: Mama, don't answer at all.

Dona Elvira: Don't you worry my son that where I fail nobody will succeed . . .

(Discussion between the doctor and attorney Porrata and Mr. Mandry.)

(The doctor realizes that all those statements are being taken down by a stenographer and requests that such note taking be discontinued right away.)

EXHIBIT 1 OF THE DEFENDANTS.

In The District Court for the Judicial District of Ponce, Puerto Rico,—Belen Gonzalez, Widow of Tous, Petitioner.—Ex-Parte.—No. 7850.—Utility and Necessity.

PETITION.

Now comes before this Court petitioner, Mrs. Belen Gonzalez, widow of Tous, through her undersigned attorney and respectfully states:

1. That petitioner is of age, a widow, property owner, domiciled in Ponce and is mother with *patria potestas* over her minor children Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, who are 20, 19, 17 and 13 years old respectively, and guardian of Jose Tous y Gonzalez, incapacitated, to which office I was appointed by this Court, which appointment I accepted and has been entered in the proper registry of guardianship in this Court.

2. That by public deed No. 13 of March 23, 1932, executed before notary Fernando Zapater y Martinez, acting in the place of Jose Tous Soto, there was constituted by Mrs. Elvira Olivieri Commins a voluntary mortgage in favor of the partnership Mario Mercado e Hijos to secure the payment of four promissory notes payable to bearer by indorsement, to wit:

Promissory note No. 1 for $10,000.00 payable on March 23, 1939. Interest thereon $2,700.00. Costs $500.00.

Promissory note No. 2 for $10,000.00, payable on March 23, 1939. Interest thereon $2,700.00. Costs $500.00.

Promissory note No. 3 for $10,000.00, payable on March 23, 1939. Interest thereon $2,700.00. Costs $500.00.

Promissory note No. 4 for $11,256.89, payable on March 23, 1939. Interest thereon $3,000.00. Costs $500.00.

The amount of said mortgage was increased so as to cover $11,100.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees, the same to be constituted upon a joint half interest in the following immovables:

Number One:—A piece of rural property known as "Juanita" lying in the "Pueblo" and "Quebrada" barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the Rufina plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said Rufina plantation; on the west by land of the San Rafael plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to Piedras Blancas barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

Number Two: A piece of rural property known as "Los Indios" lying in the "Indios" barrio within the municipal district of Guayanilla with an area of 430 cuerdas, equivalent

to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado & Compania, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Compania and by mangroves of the maritime zone; on the south by the Yauco river and by land of the Mercedes plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

Said mortgage is recorded in the Registry of Property.

3. That the aforesaid Dona Belen-Maria, Dona Gladys, Don Jorge and Don Hector Tous y Gonzalez, and the incapacitated one, Jose Tous y Gonzalez, together with their major sisters, Luz-Belen, Ana-Rosa, Celia and Alicia Tous y Gonzalez, own an interest in the sum of $20,000.00 and have agreed with the partnership Mario Mercado e Hijos, actually the holder of the aforesaid mortgage and of the said mortgage notes, together with their mother, petitioner herein, Mrs. Belen Gonzalez, widow of Tous, to purchase the aforesaid mortgage of $41,256.89, with the sole and exclusive alteration of being paid interest at the rate of 8-1/4% annually, payable in monthly installments at the end of each month, which interest shall be paid by the partnership Mario Mercado e Hijos.

4. That likewise the partnership Mario Mercado e Hijos, which is an agricultural civil partnership with assets over $1,000,000.00, shall become a solidary surety of the principal and interest of the aforesaid mortgage, reserving to itself 3/4 of 1% of the annual

interest, as a consideration of the assumption by said partnership of the obligation to secure the principal and interest of such mortgage, as assigned, said interest to be paid monthly instead of semi-annually at the end of each semester, as agreed upon in the aforesaid notes.

5. The aforesaid notes are all of them drafted as follows:

No. . For $. To become due . I promise to pay to the holder by indorsement of this promissory note on day, 193 , the sum of received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. , of a series of four, totalling $. To secure the above sum, $ for interest thereon and $ for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called "Juanita", with an area of 481.77 cuerdas more or less, lying in the "Pueblo" and "Quebrada" barrios of the municipal district of Guayanilla, Puerto Rico, and the other, called "Los Indios", with an area of 430 cuerdas, lying in the "Indios" barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) Elvira Olivieri.

Affidavit No. . Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Yauco, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater, Notary Public.

6. That this transaction is necessary and of utility and neces-

sity as regards said minors inasmuch as in this way they may be able to receive a steady monthly income.

7. That the proportion in which said mortgage credit shall be distributed is as follows: $21,256.89 to Mrs. Belen Gonzalez, widow of Tous—$20,000.00 to Luz-Belen, Ana-Rosa, Celia and Alicia Tous Gonzalez, of age,—Belen-Maria, Gladys, Jorge and Hector Tous Gonzalez, minors, and Jose Tous Gonzalez, incapacitated.

By Virtue of the Foregoing and on the ground of utility and necessity, we pray the Court to authorize the petitioner herein, Mrs. Belen Gonzalez, widow of Tous, in behalf of her minor children, Belen-Maria, Gladys, Jorge and Hector Tous Gonzalez and the incapacitated one Jose Tous y Gonzalez, to invest the respective shares of said minors and the incapacitated one of the aforesaid sum of $20,000.00 in acquiring the aforesaid mortgage, with the terms stated.

Ponce, Puerto Rico, May 4, 1933.

(Sgd.) F. ZAPATER,
Attorney for petitioner.

I, Belen Gonzalez, widow of Tous, solemnly swear: That I am the petitioner in the present case; that I have read the foregoing petition and that the facts therein stated are true and of my own knowledge.

(Sgd.) BELEN G., widow of Tous Soto

Sworn to and subscribed before me by Dona Belen G., widow of Tous, of age, property owner, domiciled in Ponce, whom I certify to know in Ponce, Puerto Rico, May 5, 1933.

(Sgd.) A. Maldonado,
Deputy Clerk District Court of Ponce, P. R.

Served with copy this 5th day of May, 1933.

(Sgd.) R. V. Perez Marchand,
District Attorney.

(There is affixed hereto and cancelled a $5.00 internal revenue stamp and the file seal duly stamped.)

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez, Widow of Tous, Petitioner.—Ex Parte—Utility and Necessity—No. 7850.

Affidavit

I, Belen Gonzalez, widow of Tous, Do Solemnly Swear:

That I am of age, widow of Mr. Jose Tous Soto, property owner and domiciled in Ponce.

That I am the mother with *patria potestas* over my minor children Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, 20, 19, 17 and 13 years old respectively, and guardian of the incapacitated one, Jose Tous y Gonzalez, to which office I was appointed by the District Court of Ponce, Puerto Rico, having accepted and taken the oath of office and entered the appointment on the registry of guardianship of this Court.

That I have closed a deal with the agricultural civil partnership Mario Mercado e Hijos for the acquisition of a mortgage credit in favor of said partnership constituted by Mrs. Elvira Olivieri Commins by public deed No. 13 of March 23, 1932, before notary Fernando Zapater y Martinez, acting in the place of my deceased husband, attorney José Tous Soto, to secure the payment of four promissory notes as follows: promissory notes 1, 2, 3 for the sums of $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, disbursements and attorney's fees each; and promissory note 4, for the sums of $11,256.89 as principal, $3,000.00 for interest and $500.00 for costs, all of them to mature on March 23, 1939, which mortgage was constituted upon a one-half joint interest in two rural estates known as "Juanita", lying in the "Pueblo" and "Quebrada" barrios of the municipal district of Guayanilla, with an area of 481 cuerdas, and another known as "Los Indios", lying in the "Indios" barrio of the municipal district of Guayanilla, with an area of 430 cuerdas.

That more than 200 cuerdas of said estates are planted to sugar canes and are leased to the agricultural civil partnership Mario Mercado e Hijos at a lease rent totalling $8,200.00.

That I will contribute to the purchase price of such mortgage credit the sum of $21,256.89 and the balance, namely, $20,000.00 will be contributed by my aforesaid minor children, the incapacitated one Jose Tous Gonzalez and my major children Luz-Belen Tous de Usera, Ana-Rosa Tous de Carrion, Celia and Alicia Tous y Gonzalez.

That the rate of interest agreed upon on such mortgage is 9% annually, payable semi-annually at the end of each semester.

That pursuant to the above business deal, the partnership Mario Mercado e Hijos will pay us interest at the rate of 8-1/4% annually, during the life of the mortgage which will mature on March 23, 1939, said interest payable monthly at the end of each month.

That although the rate of interest agreed upon is 9% annually, as appears from said mortgage, in consideration of the fact that the agricultural civil partnership Mario Mercado e Hijos assumes the obligation to pay the interest monthly, at the end of each month, and assumes the obligation of becoming a surety in *solidum*, both for the principal and interest, until fully paid, I have agreed with said partnership Mario Mercado e Hijos that it shall pay only 8-1/4% annually and shall retain 3/4% annually thereof.

That I estimate said estates to be worth, from information given me by experts, more than $200,000.00, and that the rights of my minor children and the incapacitated one, Jose Tous y Gonzalez, shall be fully secured by the mortgage on said estates, but that they will be further secured by the obligation assumed by the partnership Mario Mercado e Hijos, which is an agricultural civil partnership of great moral solvency, with a capital above $2,000,000.00.

That all my major children consent to the carrying out of such deal.

That the aforesaid mortgage credit is duly recorded in the Registry of Property and that the aforesaid estates are not encumbered by any other charge, lien or annuity of any kind whatever.

That my minor children Belen-Maria, Jorge and the incapacitated one, Jose Tous y Gonzalez, are absent from this city of Ponce, unable to return to such city and therefore cannot give their consent to this transaction.

Ponce, Puerto Rico, May 5, 1933.

(Sgd.) BELEN G., widow of Tous Soto.

Sworn to and subscribed before me by Mrs. Belen Gonzalez, widow of Tous, of age, property owner and domiciled in Ponce, whom I certify to know personally.

Ponce, Puerto Rico, May 5, 1933.

(Sgd.) A. Maldonado,
Deputy Clerk District Court of Ponce, P. R.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez, Widow of Tous, Petitioner.—Ex Parte—No. 7850—Utility and Necessity.

Affidavit

I, Gladys Tous y Gonzalez, Do Solemnly Swear:

That I am over 14 years of age, domiciled in Ponce; that I am acquainted in detail with the deal closed by my mother and my major sisters, with the partnership Mario Mercado e Hijos regarding the acquisition by us of a mortgage credit for $41,256.89, constituted by public deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, in favor of the aforesaid partnership by Mrs. Elvira Olivieri Commins. That I am an interested party in said deal, that I consent to the same and give my absolute approval and consent for such transaction.

Ponce, Puerto Rico, May 5, 1933.

(Sgd.) GLADYS TOUS.

Sworn to and subscribed before me by Miss Gladys Tous y Gonzalez, over 14 years of age, domiciled in Ponce, whom I certify to know personally.

Ponce, Puerto Rico, May 5, 1933.

(Sgd.) A. Maldonado,
Deputy Clerk District Court of Ponce.

(The file dating stamp has been duly stamped.)

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez, Widow of Tous, Petitioner.—
No. 7850—Utility and Necessity.

Affidavit

We, Luz-Belen Tous de Usera, Celia and Alicia Tous Gonzalez, Do Solemnly Swear:

That we are over 25 years of age, domiciled in Ponce.

That we are acquainted with the deal closed between ourselves and our mother, Mrs. Belen Gonzalez Salicrup, with the agricultural civil partnership Mario Mercado e Hijos for the acquisition of a mortgage credit for $41,256.89, constituted by deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, in favor of the aforesaid partnership by Mrs. Elvira Olivieri Commins upon a one-half joint interest in two estates lying within the municipal district of Guayanilla, Puerto Rico, belonging to said Mrs. Elvira Olivieri Commins.

That said estates are worth more than $200,000.00, a large part thereof being planted to sugar canes.

That the value of said joint interests greatly exceeds the amount of the loan secured by the mortgage thereon.

That we understand that such transaction is one of utility and necessity, both as regards ourselves and as regards our minor brothers and sisters and the incapacitated one, Jose Tous Gonzalez, not only on account of the actual security constituted by

said jointly owned interest, but also by reason of the solidary security furnished by the partnership Mario Mercado e Hijos.

Ponce, Puerto Rico, May 5, 1933.

(Sgd.) LUZ-BELEN TOUS DE USERA
(Sgd.) CELIA TOUS GONZALEZ
(Sgd.) ALICIA TOUS GONZALEZ

Sworn to and subscribed before me by Mrs. Luz-Belen Tous de Usera, Dona Celia and Alicia Tous y Gonzalez, over 21 years of age, property owners, domiciled in Ponce, Puerto Rico, whom I certify to know personally.

Ponce, Puerto Rico, May 5, 1933.

(Sgd.) A. Maldonado,
Deputy Clerk District Court of Ponce.

(The file dating stamp is duly stamped.)

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez, Widow of Tous, Petitioner.—Ex Parte—No. 7850—Utility and Necessity.

DISTRICT ATTORNEY'S REPORT

The district attorney for this district favorably reports hereby on the petition of Mrs. Belen Gonzalez, widow of Tous, and recommends to the Court to approve the same.

Ponce, Puerto Rico, May 5, 1933.

(Sgd.) PEDRO RODRIGUEZ SERRA,
District Attorney.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez, Widow of Tous, Petitioner.—Ex Parte—No. 7850—Utility and Necessity.

ORDER

Whereas: Mrs. Belen Gonzalez, widow of Tous, as mother with *patria potestas* over her minor children Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, of 20, 19, 17 and 13 years of age

respectively, and as the guardian of the incapacitated, Jose Tous y Gonzalez, has applied to this court for judicial authorization to acquire, in her own behalf and in that of her major daughters, Dona Luz-Belen, Ana-Rosa, Celia and Alicia Tous y Gonzalez, together with the aforesaid minor children and of the incapacitated one Jose Tous Gonzalez, a mortgage credit for $41,256.89 as principal, $11,100.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees, to secure the payment of four promissory notes of which the first three are for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, expenses and attorney's fees and note No. 4 for $11,256.89 as principal, $3,000.00 for interest and $500.00 for costs, all of them to mature on March 23, 1939. Said mortgage was constituted by Mrs. Elvira Olivieri Commins by public deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, upon a one-half joint interest in the following immovables:

Number One: A piece of rural property known as "Juanita" lying in the "Pueblo" and "Quebrada" barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the Rufina plantation, belonging to Mario Mercado e Hijos, and the heirs of Domingo Torres represented by Isabel Yordan; on the south by said Rufina plantation; on the west by land of the San Rafael plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to Piedras Blancas barrio, and on the opposite side

by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

Number Two: A piece of rural property known as "Los Indios" lying in the "Indios" barrio within the municipal district of Guayanilla with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded on the north by the road leading from the Barina barrio to the Indios barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado & Compania, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Compania and by mangroves of the maritime zone; on the south by the Yauco river and by land of the Mercedes plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

Whereas:—It has been satisfactorily shown that the minors, Dona Belen-Maria, Dona Gladys, Don Jorge and Don Hector Tous y Gonzalez, and the incapacitated one, Don Jose Tous Gonzalez, together with their major sisters Dona Luz Belen, Ana Rosa, Celia and Alicia Tous y Gonzalez, own the sum of $20,000.00.

Whereas: It has been likewise shown that the partnership Mario Mercado e Hijos holds at present the aforesaid mortgage credit and the aforesaid four promissory notes and will bind itself to pay the interest on said mortgage by monthly installments at the end of each month at the rate of 8-1/4% and will further bind itself solidarily to secure the payment of the interest and principal of said mortgage credit.

Whereas: It has been satisfactorily shown that the price to be paid for said mortgage credit will be prorated as follows: $21,256.89 to be contributed by Dona Belen Gonzalez, widow of Tous, and $20,000.00 to be contributed by Luz-Belen, Ana Rosa, Celia and Alicia Tous Gonzalez, who are of age; Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, who are minors, and Jose Tous y Gonzalez, who is incapacitated.

Whereas: The district attorney for this district has favorably reported upon said petition.

Wherefore: The court hereby grants said petition and authorizes Dona Belen Gonzalez, widow of Tous, to acquire, in behalf of her minor children Belen Maria, Gladys, Jorge and Hector Tous Gonzalez, and as the guardian of the incapacitated one, Jose Tous Gonzalez, and together with her major daughters, Dona Luz-Belen, Ana Rosa, Celia and Alicia Tous Gonzalez, the mortgage credit constituted in favor of the agricultural civil partnership Mario Mercado e Hijos by Mrs. Elvira Olivieri Commins, by public deed No. 13, of March 23, 1932, executed before notary Fernando Zapater Martinez, acting in the place of Jose Tous Soto, the interest thereon to be paid by monthly installments at the end of each month by the partnership Mario Mercado e Hijos at the rate of 8-1/4% annually, said mortgage credit to be prorated as follows: the share of Dona Belen Gonzalez, widow of Tous, shall be $21,256.89 and that of Luz-Belen, Ana Rosa, Celia and Alicia Tous y Gonzalez, who are of age,—Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, who are minors, and Jose Tous y Gonzalez, incapacitated, $20,000.00 in equal shares and it shall be the duty of the aforesaid partnership Mario Mercado e Hijos to become a surety *in solidum* for the payment of the principal and interest of the said mortgage credit until the same is fully paid, all of which on the ground of utility and necessity regarding said minors.

Ponce, Puerto Rico, May 5, 1933.

(Sgd.) D. SEPULVEDA,
District Judge.

EXHIBIT 2 OF THE DEFENDANT.

ASSIGNMENT OF MORTGAGE CREDIT

No. 33

Ponce, Puerto Rico, May 9, 1933.

Before Me

Fernando Zapater y Martinez, attorney and notary public for this Island, with my domicile, residence and office in said city,—

There Appear

Mrs. Belen Gonzalez, widow of Tous, of age, property owner, domiciled in Ponce.

She appears in her own behalf and moreover as mother with *patria potestas* over her minor children Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, who respectively are 20, 19, 17 and 13 years old, property owners and domiciled in Ponce, duly authorized for this appearance by an order of the District Court for the Judicial District of Ponce, Puerto Rico, made in civil case No. 7850, *In re:* Utility and Necessity, on May 5, 1933, a certified copy of which shall be enclosed with the first copy of this instrument when presented for record in the Registry of Property.

She likewise appears as guardian of Don Jose Tous y Gonzalez, of age, property owner, residing at present in San Juan, Puerto Rico, and single, to which office she was appointed by the District Court for the Judicial District of Ponce, and which she accepted and was sworn in the appointment to said office as such guardian having been entered in the registry of guardianship of said district court.

Dona Luz-Belen Tous y Gonzalez, married to Don Vicente Usera, Jr., of age, property owner, domiciled in Ponce, in her own right and, moreover, as the verbal agent of her sister, Dona Ana Rosa Tous y Gonzalez, married to Don Jose B. Carrion; domiciled in San Juan, of age and property owner.

Dona Celia and Alicia Tous y Gonzalez, of age, property owners, both single and domiciled in Ponce.

Don Mario Mercado y Montalvo, of age, a widower, property owner, domiciled in Ponce. He appears as the only managing partner of the agricultural civil partnership domiciled in Guayanilla, Puerto Rico, known as Mario Mercado e Hijos, and also in his own right.

I certify to my personal knowledge of the parties and of their personal characteristics as stated by them. They assure me to be in full possession of their civil rights and, being legally qualified for the present execution, they state as follows:—

First: That the partnership Mario Mercado e Hijos owns and holds four mortgage promissory notes payable to holder by indorsement subscribed by Mrs. Elvira Olivieri Commins on March 23, 1932, promissory notes marked 1, 2 and 3 being for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, disbursements and attorney's fees, and promissory note No. 4 for $11,256.89 as principal, $3,000.00 for interest, plus $500.00 for costs, all of which to mature on March 23, 1939, said promissory notes having been subscribed before the undersigned notary, under affidavits numbered 2146 to 2149 both inclusive, such promissory notes being secured by voluntary mortgage No. 13, executed on March 23, 1932, before the undersigned notary, acting in the place of Jose Tous Soto, which literally copied reads as follows:

"Voluntary Mortgage.

"No. 13. Mayaguez, Puerto Rico, March 23, 1932. Before Me, Fernando Zapater Martinez, attorney and notary public for this Island, with residence, domicile and office in Ponce, Puerto Rico, acting in the place of my colleagues, Jose Tous Soto, There Appear Mrs. Elvira Olivieri Commins, of age, single on account of divorce, property owner, domiciled in Yauco,—

"Mr. Arturo Cortes y Valls, of age, married, an employee, domiciled in Guayanilla, Puerto Rico, who appears in the execution of the present deed in the name and representation

of the agricultural civil partnership Mario Mercado e Hijos, domiciled in Guayanilla, by virtue of the powers granted to him by deed No. 39, executed before notary Jose Tous Soto, on February 16, 1927, which he will prove wherever and whenever necessary.

"I certify to my personal knowledge of the parties hereto and to their personal characteristics as furnished by them. They assure me to be in the full enjoyment and exercise of their civil rights and in my opinion they possess the necessary legal qualifications for this execution. They state as follows:—

"First:—That Mrs. Elvira Olivieri y Commins owns a one-half joint interest in the immovables described as follows:

"Number One: — A piece of rural property known as 'Juanita' lying in the 'Pueblo' and 'Quebrada' barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the 'Rufina' plantation belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said 'Rufina' plantation; on the west by land of the 'San Rafael' plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to 'Piedras Blancas' barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Title: This estate was formed by a consolidation effected by deed No. 179, executed before notary Angel Padro, of Yauco, on November 28, 1907.

"Number Two: A piece of rural property known as 'Los Indios' lying in the 'Indios' barrio, within the municipal district of Guayanilla, with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded: on the north by the road leading from the 'Barina' barrio to the 'Indios' barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado & Compania, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Compania and by mangroves of the maritime zone; on the south by the Yauco river and by land of the 'Mercedes' plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

"Title: This jointly owned interest was acquired by Mrs. Elvira Olivieri y Commins by inheritance from Josefa Commins y Raldiris and it is recorded in the Registry of Property in the name of Mrs. Elvira Olivieri Commins on Folio 222 of Volume 12 of Guayanilla, Estate No. 534, First record.

"Second: That the estates above described are encumbered by a lease constituted in favor of Mario Mercado e Hijos by deed No. 55, executed on April 5, 1927, before notary Francisco Parra Capo of Ponce.

"Third: Mrs. Elvira Olivieri Commins acknowledges to be indebted to the partnership Mario Mercado e Hijos in the sum of $41,256.89 by reason of a current account with liquidated interest up to March 23, 1932.

"Fourth: Mrs. Elvira Olivieri Commins has agreed to pay to the partnership Mario Mercado e Hijos the amount owed

by her, as hereinafter expressed, and to that effect she executes:

"First: Mrs. Elvira Olivieri Commins, in payment of the amount owed by her to the partnership Mario Mercado e Hijos, as stated in the preceding third paragraph, executes and delivers to said partnership, through the attorney-in-fact, Arturo Cortes Valls, four promissory notes payable to bearer by indorsement, to fall due all of them on March 23, 1939, and subscribed by said lady for the following amounts:

"Promissory note No. One for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"Promissory note No. Two for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"Promissory note No. Three for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"And promissory note No. Four for $11,256.89 as principal, $3,000.00 for interest thereon and $500.00 for costs.

"Said promissory notes shall differ from each other only in their correlative numbers and amounts. They are as follows:

"No. .. 'For $. To become due . I promise to pay to the holder by indorsement of this promissory note on day, 193 , the sum of received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. , of a series of four, totalling $. To secure the above sum, $ for interest thereon, and $ for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called 'Juanita', with an area of 481.77 cuerdas more or less, lying in the 'Pueblo' and

'Quebrada' barrios of the municipal district of Guayanilla, Puerto Rico, and the other called 'Los Indios', with an area of 430 cuerdas, lying in the 'Indios' barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) Elvira Olivieri.

Affidavit No. . Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Yauco, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

There is affixed thereto and cancelled a $0.25 internal revenue stamp and affixed thereto the notarial seal.

"Second: Mrs. Elvira Olivieri Commins constitutes a voluntary mortgage upon her jointly owned interests in each of the estates above described to secure all and each of the promissory notes referred to in the foregoing clause, which lien shall encumber such condominiums until the mortgage hereby constituted is legally cancelled. Said mortgage will secure in addition to the principal of the aforesaid promissory notes, the sum of $11,100.00 for interest thereon and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery and demandable as a penalty in such event without the necessity of a liquidation.

"Third: Mrs. Elvira Olivieri y Commins and Mr. Arturo Cortes y Valls, in behalf of the partnership Mario Mercado e Hijos, appraise the mortgaged condominiums, waiving any new appraisal or action for such purpose, as follows:

"The jointly owned interest in the estate described in the first place at $25,000.00.

"The jointly owned interest in the estate described in the second place at $50,000.00.

"Fourth: Mrs. Elvira Olivieri Commins agrees with the

partnership Mario Mercado e Hijos, that out of the rentals to which she is entitled under the contract of lease referred to in the second paragraph of said deed, that is, the sum of $4,100.00, said partnership shall retain, to be applied to the payment of the interest accrued, the sum required to cover the above amount, such retention to begin on June 2, 1932, and so on every time the same becomes due, that is, on March 4 and June 2 of each year.

"Fifth: It is stipulated that by failing to pay three installments of interest upon becoming due, the obligor shall forfeit the right to avail herself of the term allowed for paying the principal and the obligee may recover judicially on all or either of the promissory notes by means of a summary or an ordinary action.

"Sixth: If at the termination of the contract of lease referred to in paragraph second of this instrument, the mortgage promissory notes have not been paid, the obligor or her assignees or successors in interest bind themselves to impose upon any lessee the obligation to deduct from the rentals agreed upon the necessary sums for the payment of the interest owing to Mario Mercado e Hijos and to effect such payment to said partnership on the account of the obligor, as stipulated in clause 4 of this deed.

"Seventh: Option to Purchase and Sell and to Lease.—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates 'Indios' and 'Juanita' upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or

lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee.

"Eighth: Waiver of Homestead. Mrs. Elvira Olivieri Commins states that no homestead right has been constituted by her on any of the estates hereinbefore described, but that should she do so in the future, from now on and for all time, she waives the same in favor of the partnership Mario Mercado e Hijos, its assignees or successors in interest, in consideration of the present contract and during the life thereof.

"Ninth: It is stipulated by the parties that the obligor may pay at any time before maturity the mortgage credit herein constituted or to pay on account thereof any amount not below $5,000.00, provided she serves notice on the obligee three months prior to the time when she intends to effect the payment of the principal or the sum on account of such principal.

"Tenth: The parties likewise expressly state that the lessor has received all back rentals up to date regarding the estate described and that in the present case she has received a check for $1,500.00 on the Banco de Ponce in settlement of the annual installment becoming due in the current month of March.

"Eleventh: The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force.

"Twelfth: For the purpose of the Registry, the mortgage lien affecting the condominiums is prorated as follows:

"The jointly owned interest in the estate described in the first place shall answer for:

"The sum of $12,379.08 as principal,—

"The sum of $3,330.00 as interest,—

"The sum of $600.00 for costs.

"And the jointly owned interest in estate No. Two shall answer for the sum of $28,877.81 as principal,—

"The sum of $1,400.00 for costs, expenses and attorney's fees, and for interest on $7770.00.

"Thirteenth: All the expenses incurred by reason of the present deed, copy thereof and record in the Registry of Property and those of cancellation at the proper time, copy thereof and record shall be for the account of the obligor.

"Fourteenth: Each of the parties hereto, as far as the same is concerned, agree to the present deed in every respect as comformable to the terms agreed upon.

"It was so stated, executed and signed in the presence of witnesses Jose Nadal Grau and Oscar Souffront, residents of this district, of age, qualified and known to me. This deed has been read by me to the parties and to the witnesses upon their waiving the right to do so themselves, which I warned them they could do, its contents was ratified by the parties and they and the witnesses affixed their signatures,—in witness whereof and of everything stated, I, the notary, Certify. At this stage, it is set down by the parties that the sum referred to in the third paragraph of this deed as owed by Mrs. Elvira Olivieri Commins to the partnership Mario Mercado e Hijos amounting to $41,256.89, represents the total of the amount due up to date in every respect.

(Sgd.) Elvira Olivieri
A. Cortes
Dr. J. Nadal Grau
Oscar Souffront.

Signed, signeted, sealed and paraphed:

F. Zapater"

Second: That Mrs. Belen Gonzalez, widow of Tous, in her own right and in behalf of the parties represented by her, and her

major children appearing herein, have agreed with the partnership Mario Mercado e Hijos upon the assignment of the aforesaid mortgage credit and pursuant thereto they agree as follows:

First

Mr. Mario Mercado y Montalvo, as the sole managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, hereby conveys, renounces and assigns in favor of Mrs. Belen Gonzalez, widow of Tous, in the representation in which she appears in this execution and in her own right, and to Dona Ana Rosa Tous de Carrion, Dona Luz Belen Tous de Usera, Dona Alicia and Dona Celia Tous y Gonzalez, the mortgage credit constituted by the deed above transcribed, the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act and in my presence and that of the witnesses the four mortgage promissory notes above mentioned duly endorsed, to all of which, I, the notary, certify.

Second

It is hereby made known that in the mortgage credit above referred to and which has been the subject matter of the assignment in the present instrument, Dona Belen Gonzalez, widow of Tous, owns an interest amounting to $21,256.89, and the balance, that is, the sum of $20,000.00 is prorated share and share alike among all her major children who appear herein, and her minor children represented by her in this transaction.

Third

The parties expressly agree that though it is true that in the said mortgage deed, which is the subject matter of this assignment, the rate of interest agreed upon is 9% annually, the fact is that in consideration of the obligation that will be hereinafter assumed by the partnership Mario Mercado e Hijos to pay the interest to be accrued by monthly installments at the end of each month, said partnership Mario Mercado e Hijos shall be entitled to retain 3/4 of 1% annually of the aforesaid interest during the

life of this mortgage, as a consideration, as above stated, of the obligation to be assumed in the next clause of this deed.

Fourth

The partnership Mario Mercado e Hijos binds itself to pay to the assignees in monthly installments at the end of each month the interest on the mortgage hereby assigned at the rate of 8-1/4% annually.

Fifth

The partnership Mario Mercado e Hijos, through its managing partner, Mr. Mario Mercado Montalvo, and the latter in his own behalf, hereby constitute themselves in solidary sureties, not only for the principal of the mortgage assigned hereby, but also for the amount of interest on said mortgage during all the time comprised between now and the payment in full of principal and interest.

Sixth

The parties expressly agree that in case of the assignor, the partnership Mario Mercado e Hijos, should fail to pay the proper interest at maturity of any of the monthly installments, said partnership shall not be considered to be in default and shall not be compelled to effect the payment until the expiration of thirty days from the time of said installment becoming due.

Seventh

The assignment set out in the first clause of this instrument is made for the consideration of $41,256.89 delivered in this act to Mr. Mario Mercado Montalvo as manager of the partnership Mario Mercado e Hijos and in my presence and that of the witnesses, to which I certify, by the assignees, in a certified check on the National City Bank for which sum he gives the proper release and acquittance.

Eighth

It is likewise stipulated and agreed that any tax, excise or impost that might be levied upon the principal of or interest on the

mortgage the subject matter of this assignment, by either the Federal Government or the Insular Government, or any municipality, shall be paid for the account of and chargeable to the partnership Mario Mercado e Hijos.

Ninth

It is likewise agreed that the partnership Mario Mercado e Hijos shall see to it that payment is timely made of the taxes upon the estates encumbered by the mortgage that is hereby assigned, and in case of failure on the part of the mortgagor to pay the same the partnership Mario Mercado e Hijos will pay them within the proper semester.

Tenth

The parties in their respective rights and representations accept the present deed as drafted, as conforming to the terms agreed upon by them; and I, the notary, in accordance with law, call their attention to their rights and duties under the law concerning this execution.

It is so stated and executed in my presence and that of the witnesses, legally qualified, domiciled in this district and known to me, Mr. Rafael Torres and Mr. Julio Mirailh.

The present deed has been read by the parties and the witnesses, in the exercise of their right as advised by me, its contents were approved by the parties and all of them affixed their signatures before me, the notary, who certify to everything set down.

(Sgd.) Mario Mercado Montalvo
Belen G., widow of Tous Soto
Celia Tous Gonzalez
Alicia Tous Gonzalez
Luz B. Tous de Usera
J. Mirailh
Rafael Torres

Signed, signeted, sealed and paraphed:

F. Zapater.

There are affixed hereto and cancelled the proper internal revenue stamps. Initials: B. G. T. (There is attached hereto the following Notice of Assignment:)

Notice of Assignment

Mrs. Elvira Olivieri Commins, Mayaguez, Puerto Rico: You are hereby notified that on even date Mr. Mario Mercado Montalvo, as manager of the partnership Mario Mercado e Hijos and by deed executed before me and marked No. 33, has assigned in favor of the Heirs of Jose Tous Soto, the mortgage credit constituted by you in favor of the latter by indorsement of four mortgage promissory notes subscribed by you on March 23, 1932, notes marked 1, 2 and 3 for the sums of $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, respectively, and note marked 4 for $11,256.89 as principal, $3,000.00 for interest and $500.00 for costs, which promissory notes were held by the aforesaid partnership, which mortgage was constituted by you by deed No. 13, executed before notary Jose Tous Soto on March 23, 1932, upon the 1/2 joint interests held by you in the estates known as "Juanita" lying in the "Pueblo" and "Quebrada" barrios of the municipal district of Guayanilla, with an area of 481 cuerdas, and estate known as "Los Indios" lying in the "Indios" barrio of Guayanilla with an area of 430 cuerdas, an unverified copy of said deed of assignment being enclosed herewith. Ponce, Puerto Rico, May 9, 1933.

(Sgd.) F. Zapater,
Notary Public. (Notarial seal.)

I Hereby Certify that on even date and prior to the collection of the mail for the city of Mayaguez, Puerto Rico, I deposited in the post office of Ponce an envelope duly sealed and with the proper postage enclosing a true and faithful copy of the deed of assignment referred to in the foregoing notice, as well as of this Notice of Assignment addressed as follows: Mrs. Elvira Olivieri Commings, Mayaguez, Puerto Rico. That between Ponce and

Mayaguez there is a regular daily mail service. Ponce, Puerto Rico, May 10, 1933.

(Sgd.) Zapater,
Notary Public. (Notarial seal.)

(There is attached hereto a current printed form of the post office of Ponce, No. 4270, which reads as follows:

"Receipt for registered article No. 4270. (Postmark of) —Registered at the post office indicated in post mark. Fee paid 15 cents. Class postage –12– Return receipt fee : Spl. Del'y. fee . Delivery restricted to addressee in person, or order. Accepting employee will place his initial in space indicating restrictive delivery . Postmaster: (Per) R. O.—Mailing office: Ponce, P. R., May 10, 1933.—Registered. The sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity. Registry fee and indemnity . Domestic registry fees range from 15 cents for indemnity not exceeding $50.00 up to $1.00 for indemnity not exceeding $1,000.00. The fee on domestic registered matter without intrinsic value and for which indemnity is not paid is 15 cents. Consult postmaster as to the specific domestic registry fees and as to the registry fees chargeable on registered parcel post packages for foreign countries. Fees on domestic registered C. O. D. may range from 25 cents to $1.20. Indemnity claims must be filed within one year (C. O. D. six months) from date of mailing. Form 3806. (Rev. 7-129) C5-6852. U. S. Government Printing Office, 1929."

Marginal Notes: On the same day, month and year of its execution I issued a copy to interested party. I attest.

(Sgd.) F. Zapater.

On this the 7th day of December, 1937, I issued a copy of this deed to Mr. Manuel Francisco Lluberas. I attest.

(Sgd.) Zapater.

This is a true and faithful copy of its original which under the above number is on file in the protocol of the year referred to, to which I make reference. In witness whereof and at the request of the partnership Mario Mercado e Hijos I issue the present copy which I sign, signet, paraph and seal in Ponce, P. R., on this the 20th day of December, 1937.

(Sgd.) F. Zapater.

(There are affixed hereto and cancelled internal revenue stamps worth $4.50 and on all the folios there has been affixed the notarial seal, paraph of the notary and seal of the Registry of Property.) The following appears on the back of the last page: "I, Miguel Planellas Yanez, Registrar of Property of Ponce, Puerto Rico, and its Mortgage District, Do Hereby Certify:

"1. That the contract to which this instrument refers, which is a copy of deed No. 33 of May 9, 1933, executed before notary Fernando Zapater Y Martinez, of Ponce, and by virtue of another copy thereof, and having on view other supplementary papers, was recorded on May 16, 1933, as regards the estate 'Los Indios', on folio 201 of Volume 33 of Guayanilla, estate No. 534 triplicate, 14th record, and, as regards the estate 'Juanita', on the back of folio 24 of Volume 16 of Guayanilla, estate No. 711, 12th record, on which records there was set down the curable defect of the failure of the purchaser Ana Rosa Tous y Gonzalez being legally represented in the execution.

"2. That the aforesaid mortgage credit appears at present from the Registry as having been cancelled according to the 16th record of estate No. 534 quadruplicate, on the back of folio 187 of Volume 36 of Guayanilla, and according to a note on the margin of record 12 of estate No. 711 triplicate, on folio 1 of Volume 34 of Guayanilla, which entries were made on March 20, 1937, in accordance with a copy of deed No. 47 of March 8, 1937, executed before notary Fernando Zapater y Martinez.

"3. That the same is not verified as regards other particulars because the petitioner has not so requested.

"In witness whereof and at the request of attorney Leopoldo Tormes Garcia I issue the present copy in Ponce, Puerto Rico, on this the 10th day of November, 1939.

"(Sgd.) Miguel Planellas Yanez,
Registrar of Property
of Ponce, Puerto Rico.

"(There are affixed hereto and cancelled 2 internal revenue stamps worth $1.00 each and the seal of the Registry of Property.) Lower down it reads: 'Cancelled two $1.00 stamps, No. 6 of the Schedule of Fees. Ponce, Puerto Rico, November 10, 1939.

The Registrar (Sgd.) Miguel Planellas.'"

(It has a cover page with the following legend):

"Attorney Fernando Zapater Martinez—Attorney and Notary Public—No. 33—Deed of Assignment of Mortgage—Executed by Mrs. Belen Gonzalez, Widow of Tous Soto, Mr. Mario Mercado Montalvo and Mrs. Elvira Olivieri y Commins—May 9, 1933—Ponce, Puerto Rico."

EXHIBIT 3 OF THE DEFENDANTS.

Attorney Fernando Zapater Martinez—Attorney and Notary Public—Ponce, Puerto Rico.

NOTICE OF ASSIGNMENT

Mrs. Elvira Olivieri Commins, Mayaguez, Puerto Rico:

You are hereby notified that on even date Mr. Mario Mercado Montalvo, as manager of the partnership Mario Mercado e Hijos and by deed executed before me and marked No. 33, has assigned in favor of the Heirs of Jose Tous Soto, the mortgage credit constituted by you in favor of the latter by indorsement of four mortgage promissory notes subscribed by you on March 23, 1932,

notes marked 1, 2 and 3 for the sums of $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, respectively, and note marked 4 for $11,256.89 as principal, $3,000.00 for interest and $500.00 for costs, which promissory notes were held by the aforesaid partnership, which mortgage was constituted by you by deed No. 13, executed before notary Jose Tous Soto on March 23, 1932, upon the 1/2 joint interests held by you in the estates known as "Juanita" lying in the "Pueblo" and "Quebrada" barrios of the municipal district of Guayanilla, with an area of 481 cuerdas, and estate known as "Los Indios" lying in the "Indios" barrio, of Guayanilla with an area of 430 cuerdas; an unverified copy of said deed of assignment being enclosed herewith. Ponce, Puerto Rico, May 9, 1933.

(Sgd.) F. ZAPATER,
Notary Public.

I Hereby Certify: That on even date and prior to the collection of the mail for the city of Mayaguez, Puerto Rico, I deposited in the post office of Ponce an envelope duly sealed and with the proper postage enclosing a true and faithful copy of the deed of assignment referred to in the foregoing notice, as well as of this Notice of Assignment addressed as follows: "Mrs. Elvira Olivieri Commins, Mayaguez, Puerto Rico." That between Ponce and Mayaguez there is a regular daily mail service. Ponce, Puerto Rico, May 10, 1933.

(Sgd.) F. Zapater,
Notary Public.

(There is stamped hereon the notarial seal.)

ASSIGNMENT OF MORTGAGE CREDIT

No. 33

Ponce, Puerto Rico, May 9, 1933.

Before Me

Fernando Zapater y Martinez, attorney and notary public for this Island, with my domicile, residence and office in said city,—

There Appear

Mrs. Belen Gonzalez, widow of Tous, of age, property owner, domiciled in Ponce.

She appears in her own behalf and, moreover, as mother with *patria potestas* over her minor children Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, who respectively are 20, 19, 17 and 13 years old, property owners and domiciled in Ponce, duly authorized for this appearance by an order of the District Court for the Judicial District of Ponce, Puerto Rico, made in civil case No. 7850, *In re:* Utility and Necessity, on May 5, 1933, a certified copy of which shall be enclosed with the first copy of this instrument when presented for record in the Registry of Property.

She likewise appears as guardian of Don Jose Tous y Gonzalez, of age, property owner, residing at present in San Juan, Puerto Rico, and single, to which office she was appointed by the District Court for the Judicial District of Ponce, and which she accepted and was sworn in, the appointment to said office as such guardian having been entered in the registry of guardianship of said district court.

Dona Luz-Belen Tous y Gonzalez, married to Don Vicente Usera, Jr., of age, property owner, domiciled in Ponce, in her own right and, moreover, as the verbal agent of her sister, Dona Ana Rosa Tous y Gonzalez, married to Don Jose B. Carrion, domiciled in San Juan, of age and property owner.

Dona Celia and Alicia Tous y Gonzalez, of age, property owners, both single and domiciled in Ponce.

Don Mario Mercado y Montalvo, of age, a widower, property owner, domiciled in Ponce. He appears as the only managing partner of the agricultural civil partnership domiciled in Guayanilla, Puerto Rico, known as Mario Mercado e Hijos, and also in his own right.

I certify to my personal knowledge of the parties and of their personal characteristics as stated by them. They assure me to be in full possession of their civil rights and, being legally qualified for the present execution, they state as follows:—

First: That the partnership Mario Mercado e Hijos owns and holds four mortgage promissory notes payable to holder by indorsement subscribed by Mrs. Elvira Olivieri Commins on March 23, 1932, promissory notes marked 1, 2 and 3 being for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, disbursements and attorney's fees, and promissory note No. 4 for $11,256.89 as principal, $3,000.00 for interest, plus $500.00 for costs, all of which to mature on March 23, 1939, said promissory notes having been subscribed before the undersigned notary, under affidavits numbered 2146 to 2149 both inclusive, such promissory notes being secured by voluntary mortgage No. 13, executed on March 23, 1932, before the undersigned notary, acting in the place of Jose Tous Soto, which literally copied reads as follows:

"Voluntary Mortgage. No. 13. Mayaguez, Puerto Rico, March 23, 1932.—Before Me—Fernando Zapater Martinez, attorney and notary public for this Island, with residence, domicile and office in Ponce, Puerto Rico, acting in the place of my colleague Jose Tous Soto, There Appear Mrs. Elvira Olivieri Commins, of age, single on account of divorce, property owner, domiciled in Yauco,—

"Mr. Arturo Cortes y Valls, of age, married, an employee, domiciled in Guayanilla, Puerto Rico, who appears in the execution of the present deed in the name and representation of the agricultural civil partnership Mario Mercado e Hijos, domiciled in Guayanilla, by virtue of the powers granted to him by deed No. 39, executed before notary Jose Tous Soto, on February 16, 1927, which he will prove wherever and whenever necessary.

"I certify to my personal knowledge of the parties hereto and to their personal characteristics as furnished by them. They assure me to be in the full enjoyment and exercise of their civil rights and in my opinion they possess the necessary legal qualifications for this execution. They state as follows:

"First: That Mrs. Elvira Olivieri y Commins owns a one-half joint interest in the immovables described as follows:

"Number One: A piece of rural property known as 'Juanita' lying in the 'Pueblo' and 'Quebrada' barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded on the north by land of Rafael Lopez, of the 'Rufina' plantation belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said 'Rufina' plantation; on the west by land of the 'San Rafael' plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to 'Piedras Blancas' barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Title: This estate was formed by a consolidation effected by deed No. 179, executed before notary Angel Padro, of Yauco, on November 28, 1907.

"Number Two: A piece of rural property known as 'Los Indios' lying in the 'Indios' barrio, within the municipal district of Guayanilla, with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded: on the north by the road leading from the 'Barina' barrio to the 'Indios' barrio, of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado & Compania, now

Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Compania and by mangroves of the maritime zone; on the south by the Yauco river and by land of the 'Mercedes' plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

"Title: This jointly owned interest was acquired by Mrs. Elvira Olivieri y Commins by inheritance from Josefa Commins y Raldiris and it is recorded in the Registry of Property in the name of Mrs. Elvira Olivieri Commins on Folio 222 of Volume 12 of Guayanilla, Estate No. 534, First record.

"Second: That the estates above described are encumbered by a lease constituted in favor of Mario Merçado e Hijos by deed No. 50, executed on April 5, 1927, before notary Francisco Parra Capo, of Ponce.

"Third: Mrs. Elvira Olivieri Commins acknowledges to be indebted to the partnership Mario Mercado e Hijos in the sum of $41,256.89 by reason of a current account with liquidated interest up to March 23, 1932.

"Fourth: Mrs. Elvira Olivieri Commins has agreed to pay to the partnership Mario Mercado e Hijos the amount owed by her, as hereinafter expressed, and to that effect she executes:

"First: Mrs. Elvira Olivieri Commins, in payment of the amount owed by her to the partnership Mario Mercado e Hijos, as stated in the preceding third paragraph, executes and delivers to said partnership through the attorney-in-fact, Arturo Cortes Valls, four promissory notes payable to bearer by endorsement, to fall due all of them on March 23, 1939, and subscribed by said lady for the following amounts:

"Promissory note No. One for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"Promissory note No. Two for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"Promissory note No. Three for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"And promissory note No. Four for $11,256.89 as principal, $3,000.00 for interest thereon and $500.00 for costs.

"Said promissory notes shall differ from each other only in their correlative numbers and amounts. They are as follows:

"No. . For $. To become due . I promise to pay to the holder by indorsement of this promissory note on day, 193 , the sum of received to my entire satisfaction as a loan. This amount will bear interest at 9% annually, until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. of a series of four, totalling $. To secure the above sum, $ for interest thereon and $ for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called 'Juanita', with an area of 481.77 cuerdas more or less, lying in the 'Pueblo' and 'Quebrada' barrios of the municipal district of Guayanilla, Puerto Rico, and the other called 'Los Indios', with an area of 430 cuerdas, lying in the 'Indios' barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) Elvira Olivieri.

Affidavit No. . Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Yauco, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

There is affixed thereto and cancelled a $0.25 internal revenue stamp and affixed thereto the notarial seal.

"Second: Mrs. Elvira Olivieri Commins constitutes a voluntary mortgage upon her jointly owned interests in each of the estates above described to secure all and each of the promissory notes referred to in the foregoing clause, which lien shall encumber such condominiums until the mortgage hereby constituted is legally cancelled. Said mortgage will secure in addition to the principal of the aforesaid promissory notes, the sum of $11,100.00 for interest thereon and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery and demandable as a penalty in such event without the necessity of a liquidation.

"Third: Mrs. Elvira Olivieri y Commins and Mr. Arturo Cortes y Valls, in behalf of the partnership Mario Mercado e Hijos, appraise the mortgaged condominiums, waiving any new appraisal or action for such purpose, as follows:

"The jointly owned interest in the estate described in the first place at $25,000.00.

"The jointly owned interest in the estate described in the second place at $50,000.00.

"Fourth: Mrs. Elvira Olivieri Commins agrees with the partnership Mario Mercado e Hijos, that out of the rentals to which she is entitled under the contract of lease referred to in the second paragraph of said deed, that is, the sum of $4,100.00, said partnership shall retain, to be applied to the payment of the interest accrued, the sum required to cover the above amount, such retention to begin on June 2, 1932, and so on every time the same becomes due, that is, on March 4 and June 2 of each year.

"Fifth: It is stipulated that by failing to pay three installments of interest upon becoming due, the obligor shall forfeit the right to avail herself of the term allowed for paying the principal and the obligee may recover judicially on all or

either of the promissory notes by means of a summary or an ordinary action.

"Sixth: If at the termination of the contract of lease referred to in paragraph second of this instrument, the mortgage promissory notes have not been paid, the obligor or her assignees or successors in interest bind themselves to impose upon any lessee the obligation to deduct from the rentals agreed upon the necessary sums for the payment of the interest owing to Mario Mercado e Hijos and to effect such payment to said partnership on the account of the obligor, as stipulated in clause 4 of this deed.

"Seventh: Option to Purchase and Sell and to Lease. Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates 'Indios' and 'Juanita' upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee.

"Eighth: Waiver of Homestead. Mrs. Elvira Olivieri Commins states that no homestead right has been constituted by her on any of the estates hereinbefore described, but that should she do so in the future, from now on and for all time, she waives the same in favor of the partnership Mario Mer-

cado e Hijos, its assignees or successors in interest, in consideration of the present contract and during the life thereof.

"Ninth: It is stipulated by the parties that the obligor may pay at any time before maturity the mortgage credit herein constituted or to pay on account thereof any amount not below $5,000.00, provided she serves notice on the obligee three months prior to the time when she intends to effect the payment of the principal or the sum on account of such principal.

"Tenth: The parties likewise expressly state that the lessor has received all back rentals up to date regarding the estate described and that in the present case she has received a check for $1,500.00 on the Banco de Ponce in settlement of the annual installment becoming due in the current month of March.

"Eleventh: The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force.

"Twelfth: For the purpose of the Registry, the mortgage lien affecting the condominiums is prorated as follows:

"The jointly owned interest in the estate described in the first place shall answer for:

"The sum of $12,379.08 as principal,—

"The sum of $3,330.00 as interest,—

"The sum of $600.00 for costs.

"And the jointly owned interest in estate No. Two shall answer for the sum of $28,877.81 as principal,—

"The sum of $1,400.00 for costs, expenses and attorney's fees, and for interest on $7770.00.

"Thirteenth: All the expenses incurred by reason of the present deed, copy thereof and record in the Registry of Property and those of cancellation at the proper time, copy thereof and record shall be for the account of the obligor.

"Fourteenth: Each of the parties hereto, as far as the same is concerned, agree to the present deed in every respect as conformable to the terms agreed upon.

"It was so stated, executed and signed in the presence of witnesses Jose Nadal Grau and Oscar Souffront, residents of this district, of age, qualified and known to me. This deed has been read by me to the parties and to the witnesses upon their waiving the right to do so themselves, which I warned them they could do, its contents was ratified by the parties and they and the witnesses affixed their signatures,—in witness whereof and of everything stated, I, the notary, Certify. At this stage, it is set down by the parties that the sum referred to in the third paragraph of this deed as owed by Mrs. Elvira Olivieri Commins to the partnership Mario Mercado e Hijos amounting to $41,256.89, represents the total of the amount due up to date in every respect.

"(Sgd.) Elvira Olivieri
A. Cortes
Dr. J. Nadal Grau
Oscar Souffront

"Signed, signeted, sealed and paraphed:

F. Zapater."

Second: That Mrs. Belen Gonzalez, widow of Tous, in her own right and in behalf of the parties represented by her, and her major children appearing herein have agreed with the partnership Mario Mercado e Hijos upon the assignment of the aforesaid mortgage credit and pursuant thereto they agree as follows:

First

Mr. Mario Mercado y Montalvo, as the sole managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, hereby conveys, renounces and assigns in favor of Mrs. Belen Gonzalez, widow of Tous, in the representation in which she appears in this execution and in her own right, and to Dona

Ana Rosa Tous de Carrion, Dona Luz Belen Tous de Usera, Dona Alicia and Dona Celia Tous y Gonzalez, the mortgage credit constituted by the deed above transcribed, the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act and in my presence and that of the witnesses the four mortgage promissory notes above mentioned duly endorsed, to all of which, I, the notary, certify.

Second

It is hereby made known that in the mortgage credit above referred to and which has been the subject matter of the assignment in the present instrument, Dona Belen Gonzalez, widow of Tous, owns an interest amounting to $21,256.89, and the balance, that is, the sum of $20,000.00 is prorated share and share alike among all her major children who appear herein, and her minor children represented by her in this transaction.

Third

The parties expressly agree that though it is true that in the said mortgage deed, which is the subject matter of this assignment, the rate of interest agreed upon is 9% annually, the fact is that in consideration of the obligation that will be hereinafter assumed by the partnership Mario Mercado e Hijos to pay the interest to be accrued by monthly installments at the end of each month, said partnership Mario Mercado e Hijos shall be entitled to retain 3/4 of 1% annually of the aforesaid interest during the life of this mortgage, as a consideration, as above stated, of the obligation to be assumed in the next clause of this deed.

Fourth

The partnership Mario Mercado e Hijos binds itself to pay to the assignees in monthly installments at the end of each month the interest on the mortgage hereby assigned at the rate of 8-1/4% annually.

Fifth

The partnership Mario Mercado e Hijos, through its managing partner, Mr. Mario Mercado Montalvo, and the latter in his own behalf, hereby constitute themselves in solidary sureties, not only for the principal of the mortgage assigned hereby, but also for the amount of interest on said mortgage during all the time comprised between now and the payment in full of principal and interest.

Sixth

The parties expressly agree that in case of the assignor, the partnership Mario Mercado e Hijos, should fail to pay the proper interest at maturity of any of the monthly installments, said partnership shall not be considered to be in default and shall not be compelled to effect the payment until the expiration of thirty days from the time of said installment becoming due.

Seventh

The assignment set out in the first clause of this instrument is made for the consideration of $11,256.89 delivered in this act to Mr. Mario Mercado Montalvo as manager of the partnership Mario Mercado e Hijos and in my presence and that of the witnesses, to which I certify, by the assignees, in a certified check on the National City Bank for which sum he gives the proper release and acquittance.

Eighth

It is likewise stipulated and agreed that any tax, excise or impost that might be levied upon the principal of or interest on the mortgage the subject matter of this assignment, by either the Federal Government or the Insular Government, or any municipality, shall be paid for the account of and chargeable to the partnership Mario Mercado e Hijos.

Ninth

It is likewise agreed that the partnership Mario Mercado e Hijos shall see to it that payment is timely made of the taxes

upon the estates encumbered by the mortgage that is hereby assigned, and in case of failure on the part of the mortgagor to pay the same, the partnership Mario Mercado e Hijos will pay them within the proper semester.

Tenth

The parties in their respective rights and representations accept the present deed as drafted, as conforming to the terms agreed upon by them; and I, the notary, in accordance with law, call their attention to their rights and duties under the law concerning this execution.

It is so stated and executed in my presence and that of the witnesses, legally qualified, domiciled in this district and known to me, Mr. Rafael Torres and Mr. Julio Mirailh.

The present deed has been read by the parties and the witnesses, in the exercise of their right as advised by me, its contents were approved by the parties and all of them affixed their signatures before me the notary, who certify to everything set down.

EXHIBIT 4 OF THE DEFENDANTS.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez Salicrup, Widow of Tous, as Mother with *Patria Potestas* Over her Minor Son Hector Tous Gonzalez, and Guardian of Jose Tous Gonzalez, Incapacitated,—Petitioner,—Ex Parte.—Civil Case No. 203. Judicial Authorization.

PETITION

Now comes the petitioner herein, Belen Gonzalez Salicrup, widow of Tous, before this Hon. Court through her undersigned attorney and respectfully states:

1. That petitioner is over 21 years of age, property owner, domiciled in Ponce and is mother with *patria potestas* over her minor son Hector Tous Gonzalez, 17 years old, property owner and domiciled in Ponce and guardian of the incapacitated one Jose Tous Gonzalez, over 21 years of age, property owner, a

casual resident of San Juan, Puerto Rico, which office she accepted and was sworn in before this Hon. Court, all of which appears in the proper registry of guardianship of this Court.

2. That by public deed No. 33 of May 9, 1933, executed before notary Fernando Zapater Martinez, recorded on the back of folio 24 of Volume 16 of Guayanilla, estate No. 711, 12th record, and on folio 201 of Volume 33 of Guayanilla, estate No. 534 triplicate, 14th record, Mr. Mario Mercado Montalvo, as managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, domiciled in Guayanilla, Puerto Rico, and, moreover, in his own right assigned to Mrs. Belen Gonzalez, widow of Tous, petitioner herein, in her own right and; moreover, as mother with *patria potestas* over her then minor children, Belen-Maria, Gladys and Jorge, and Hector Tous Gonzalez, still a minor, and as guardian of the incapacitated one, Jose Tous Gonzalez, to Luz Belen, Ana Rosa, Celia and Alicia Tous Gonzalez, a mortgage credit constituted in public deed No. 13, executed in Mayaguez on March 23, 1932, by Mrs. Elvira Olivieri Commins before the aforesaid notary, Fernando Zapater Martinez, acting in the place of Jose Tous Soto, upon a one-half jointly owned interest in the immovables described as follows:

"Number One: A piece of rural property known as 'Juanita' lying in the 'Pueblo' and 'Quebrada' barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded: on the north by land of Rafael Lopez, of the 'Rufina' plantation, belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said 'Rufina' plantation; on the west by land of the 'San Rafael' plantation owned by the Heirs of Franceschi, by land of Andres

Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to Piedras Blancas barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Number Two: A piece of rural property known as 'Los Indios' lying in the Indios barrio within the municipal district of Guayanilla with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded: on the north by the road leading from the 'Barina' barrio to the 'Indios' barrio of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado & Compania, now Mario Mercado e Hijos and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Company and by mangroves of the maritime zone; on the south by the Yauco river and by land of the 'Mercedes' plantation owned by Llubera Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez."

3. Said mortgage was constituted to secure four promissory notes payable to bearer by indorsement, all of which to mature on March 23, 1939, subscribed by said lady for the following amounts: Note No. 1 for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs; note No. 2 for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs; note No. 3 for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs; and note No. 4 for $11,256.89 as principal, $3,000.00 for interest and $500.00 for costs, said mortgage securing besides

the principal of the said notes, the sum of $11,000.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery, which notes were, pursuant to the aforesaid deed of assignment of credit, duly endorsed to the Heirs of Jose Tous Soto already referred to.

4. That in the aforesaid deed of constitution of mortgage the following stipulation was inserted:

> "Ninth: It is stipulated by the parties that the obligor may pay at any time before maturity the mortgage credit herein constituted or to pay on account thereof any amount not below $5,000.00, provided she serves notice on the obligee three months prior to the time when she intends to effect the payment of the principal or the sum on account of such principal."

5. That Mrs. Belén Gonzalez, widow of Tous, owns an interest in said mortgage credit amounting to $21,256.89 and the balance of $20,000.00 is prorated in equal shares among all her children, majors and minors, and therefore the minor Hector Tous Gonzalez and the incapacitated one, Jose Tous Gonzalez, are entitled to the sum of $2,222.22-2/9 each.

6. That the mortgagor has requested to have the aforesaid mortgage cancelled, and such mortgagees, as are of age, are willing to cancel the same and have instructed notary Fernando Zapater Martinez to proceed to draw up the proper deed of cancellation."

By Virtue Whereof we move the Court to authorize the petitioner Belén Gonzalez Salicrup, widow of Tous, to appear before a notary and execute the proper deed of cancellation of mortgage as to the share therein owned by the minor Hector Tous Gonzalez and the incapacitated one, Jose Tous Gonzalez, the amount of said shares in the principal of the said mortgage to be deposited with the clerk of this Court, to be used and disposed of in accordance with further orders of this Court, all of which with the

consent of the district attorney after a proper hearing has been had.

Ponce, Puerto Rico, March 4, 1937.

(Sgd.) F. ZAPATER,
Counsel for petitioner.

I, Belen Gonzalez, widow of Tous, Do Solemnly Swear:

That I am the petitioner in the present case; that I have read the foregoing petition, and that the facts therein stated are true and personally known to me.

Ponce, Puerto Rico, March 4, 1937.

(Sgd.) Belen G., widow of Tous Soto.

Sworn to and subscribed before me by Mrs. Belen G., widow of Tous, of age, property owner, domiciled in Ponce, P. R., whom I certify to know personally.

Ponce, Puerto Rico, March 4, 1937.

(Sgd.) E. Gotay Purcell,
Clerk of the District Court of Ponce.

Served with copy this day, the 4th of March, 1937.

R. V. Perez Marchand,
District Attorney
Per: (Sgd.) H. Rivera, Stenographer.

There are affixed hereto and cancelled a $5.00 internal revenue stamp and a Bar Association stamp. There is a note reading: "Filed March 4, 1937," and underneath a paraph.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez, Widow of Tous, et als., Petitioner.
—Ex Parte—Civil Case No. Judicial Authorization.

ENTRY UPON THE CALENDAR

To the Clerk of the Court:

Please enter upon the calendar, on Friday, the 5th instant, the hearing of this case.

Ponce, Puerto Rico, March 4, 1937.

(Sgd.) F. ZAPATER,
Counsel for petitioner.

Served with copy on this the day of March, 1937.

.....

District Attorney.

ASSIGNMENT OF MORTGAGE CREDIT

No. 33

Ponce, Puerto Rico, May 9, 1933.

Before Me

Fernando Zapater y Martinez, attorney and notary public for this Island, with my domicile, residence and office in said city,—

There Appear

Mrs. Belen Gonzalez, widow of Tous, of age, property owner, domiciled in Ponce.

She appears in her own behalf, and, moreover, as mother with *patria potestas* over her minor children Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, who respectively are 20, 19, 17 and 13 years old, property owners and domiciled in Ponce, duly authorized for this appearance by an order of the District Court for the Judicial District of Ponce, Puerto Rico, made in civil case No. 7850, *In re:* Utility and Necessity, on May 5, 1933, a certified copy of which shall be enclosed with the first copy of this instrument when presented for record in the Registry of Property.

She likewise appears as guardian of Don Jose Tous y Gonzalez, of age, property owner, residing at present in San Juan, Puerto Rico, and single, to which office she was appointed by the District Court for the Judicial District of Ponce, and which she accepted and was sworn in, the appointment to said office as such guardian having been entered in the registry of guardianship of said district court.

Dona Luz-Belen Tous y Gonzalez, married to Don Vicente Usera, Jr., of age, property owner, domiciled in Ponce, in her own right and, moreover, as the verbal agent of her sister, Dona

Ana Rosa Tous y Gonzalez, married to Don Jose B. Carrion, domiciled in San Juan, of age and property owner.

Dona Celia and Alicia Tous y Gonzalez, of age, property owners, both single and domiciled in Ponce.

Don Mario Mercado y Montalvo, of age, a widower, property owner, domiciled in Ponce. He appears as the only managing partner of the agricultural civil partnership domiciled in Guayanilla, Puerto Rico, known as Mario Mercado e Hijos, and also in his own right.

I certify to my personal knowledge of the parties and of their personal characteristics as stated by them. They assure me to be in full possession of their civil rights and, being legally qualified for the present execution, they state as follows:

First: That the partnership Mario Mercado e Hijos owns and holds four mortgage promissory notes payable to holder by indorsement subscribed by Mrs. Elvira Olivieri Commins on March 23, 1932, promissory notes marked 1, 2 and 3 being for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, disbursements and attorney's fees, and promissory note No. 4 for $11,256.89 as principal, $3,000.00 for interest, plus $500.00 for costs, all of which to mature on March 23, 1939, said promissory notes having been subscribed before the undersigned notary, under affidavits numbered 2146 to 2149 both inclusive, such promissory notes being secured by voluntary mortgage No. 13, executed on March 23, 1932, before the undersigned notary, acting in the place of Jose Tous Soto, which literally copied reads as follows:

"Voluntary Mortgage. No. 13. Mayaguez, Puerto Rico, March 23, 1932. Before Me Fernando Zapater Martinez, attorney and notary public for this Island, with residence, domicile and office in Ponce, Puerto Rico, acting in the place of my colleague Jose Tous Soto,—There Appear—Mrs. Elvira Olivieri Commins, of age, single on account of divorce, property owner, domiciled in Yauco,—

"Mr. Arturo Cortes y Valls, of age, married, an employee,

domiciled in Guayanilla, Puerto Rico, who appears in the execution of the present deed in the name and representation of the agricultural civil partnership Mario Mercado e Hijos, domiciled in Guayanilla, by virtue of the powers granted to him by deed No. 39, executed before notary Jose Tous Soto, on February 16, 1927, which he will prove wherever and whenever necessary.

"I certify to my personal knowledge of the parties hereto and to their personal characteristics as furnished by them. They assure me to be in the full enjoyment and exercise of their civil rights and in my opinion they possess the necessary legal qualifications for this execution. They state as follows:

"First: That Mrs. Elvira Olivieri y Commins owns a one-half joint interest in the immovables described as follows:

"Number One: A piece of rural property known as 'Juanita' lying in the 'Pueblo' and 'Quebrada' barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded: on the north by land of Rafael Lopez, of the 'Rufina' plantation belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said 'Rufina' plantation; on the west by land of the 'San Rafael' plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to 'Piedras Blancas' barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Title: This estate was formed by a consolidation effected

by deed No. 179, executed before notary Angel Padró, of Yauco, on November 28, 1907.

"Number Two: A piece of rural property known as 'Los Indios' lying in the 'Indios' barrio, within the municipal district of Guayanilla, with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded: on the north by the road leading from the 'Barina' barrio to the 'Indios' barrio of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado & Compania, now Mario Mercado e Hijos, and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Compania and by mangroves of the maritime zone, on the south by the Yauco river and by land of the 'Mercedes' plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez.

"Title: This jointly owned interest was acquired by Mrs. Elvira Olivieri y Commins by inheritance from Josefa Commins y Raldiris and it is recorded in the Registry of Property in the name of Mrs. Elvira Olivieri Commins on Folio 222 of Volume 12 of Guayanilla, Estate No. 534, First record.

"Second: That the estates above described are encumbered by a lease constituted in favor of Mario Mercado e Hijos by deed No. 55, executed on April 5, 1927, before notary Francisco Parra Capo, of Ponce.

"Third: Mrs. Elvira Olivieri Commins acknowledges to be indebted to the partnership Mario Mercado e Hijos in the sum of $41,256.89 by reason of a current account with liquidated interest up to March 23, 1932.

"Fourth: Mrs. Elvira Olivieri Commins has agreed to pay

to the partnership Mario Mercado e Hijos the amount owed by her, as hereinafter expressed, and to that effect she executes:

"First: Mrs. Elvira Olivieri Commins, in payment of the amount owed by her to the partnership Mario Mercado e Hijos, as stated in the preceding third paragraph, executes and delivers to said partnership, through the attorney-in-fact, Arturo Cortes Valls, four promissory notes payable to bearer by endorsement, to fall due all of them on March 23, 1939, and subscribed by said lady for the following amounts:

"Promissory note No. One for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"Promissory note No. Two for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

Promissory note No. Three for $10,000.00 as principal, $2,700.00 for interest thereon and $500.00 for costs.

"And promissory note No. Four for $11,256.89 as principal, $3000.00 for interest thereon and $500.00 for costs.

"Said promissory notes shall differ from each other only in their correlative numbers and amounts. They are as follows:

"No. . For $. To become due . I promise to pay to the holder by indorsement of the promissory note on day, 193 , the sum of received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. , of a series of four, totalling $. To secure the above sum, $ for interest thereon and $ for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called 'Juanita', with an area of 481.77 cuerdas more or less, lying in the 'Pueblo' and 'Que-

brada' barrios of the municipal district of Guayanilla, Puerto Rico, and the other called 'Los Indios', with an area of 430 cuerdas, lying in the 'Indios' barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) Elvira Olivieri.

Affidavit No. . Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Yauco, Puerto Rico, whom I certify to know personally in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

There is affixed thereto and cancelled a $0.25 internal revenue stamp and affixed thereto the notarial seal.

"Second: Mrs. Elvira Olivieri Commins constitutes a voluntary mortgage upon her jointly owned interests in each of the estates above described to secure all and each of the promissory notes referred to in the foregoing clause, which lien shall encumber such condominiums until the mortgage hereby constituted is legally cancelled. Said mortgage will secure, in addition to the principal of the aforesaid promissory notes, the sum of $11,100.00 for interest thereon and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery and demandable as a penalty in such event without the necessity of a liquidation.

"Third: Mrs. Elvira Olivieri Commins and Mr. Arturo Cortes y Valls, in behalf of the partnership Mario Mercado e Hijos, appraise the mortgaged condominiums, waiving any new appraisal or action for such purpose, as follows:

"The jointly owned interest in the estate described in the first place at $25,000.00.

"The jointly owned interest in the estate described in the second place at $50,000.00.

"Fourth: Mrs. Elvira Olivieri Commins agrees with the

partnership Mario Mercado e Hijos, that out of the rentals to which she is entitled under the contract of lease referred to in the second paragraph of said deed, that is, the sum of $4,100.00, said partnership shall retain, to be applied to the payment of the interest accrued, the sum required to cover the above amount, such retention to begin on June 2, 1932, and so on every time the same becomes due, that is, on March 4 and June 2 of each year.

"Fifth: It is stipulated that by failing to pay three installments of interest upon becoming due, the obligor shall forfeit the right to avail herself of the term allowed for paying the principal and the obligee may recover judicially on all or either of the promissory notes by means of a summary or an ordinary action.

"Sixth: If at the termination of the contract of lease referred to in paragraph second of this instrument, the mortgage promissory notes have not been paid, the obligor or her assignees or successors in interest bind themselves to impose upon any lessee the obligation to deduct from the rentals agreed upon the necessary sums for the payment of the interest owing to Mario Mercado e Hijos and to effect such payment to said partnership on the account of the obligor, as stipulated in clause 4 of this deed.

"Seventh: Option to Purchase and Sell and to Lease. Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates 'Indios' and 'Juanita' upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or

lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee.

"Eighth: Waiver of Homestead. Mrs. Elvira Olivieri Commins states that no homestead right has been constituted by her on any of the estates hereinbefore described, but that should she do so in the future, from now on and for all time, she waives the same in favor of the partnership Mario Mercado e Hijos, its assignees or successors in interest, in consideration of the present contract and during the life thereof.

"Ninth: It is stipulated by the parties that the obligor may pay at any time before maturity the mortgage credit herein constituted or to pay on account thereof any amount not below $5,000.00, provided she serves notice on the obligee three months prior to the time when she intends to effect the payment of the principal or the sum on account of such principal.

"Tenth: The parties likewise expressly state that the lessor has received all back rentals up to date regarding the estate described and that in the present case she has received a check for $1,500.00 on the Banco de Ponce in settlement of the annual installment becoming due in the current month of March.

"Eleventh: The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force.

"Twelfth: For the purpose of the Registry, the mortgage lien affecting the condominiums is prorated as follows:

"The jointly owned interest in the estate described in the first place shall answer for:

"The sum of $12,379.08 as principal,—

"The sum of $3,330.00 as interest,—

"The sum of $600.00 for costs.

"And the jointly owned interest in estate No. Two shall answer for the sum of $28,877.81 as principal,—

"The sum of $1,400.00 for costs, expenses and attorney's fees, and for interest on $7770.00.

"Thirteenth: All the expenses incurred by reason of the present deed, copy thereof and record in the Registry of Property, and those of cancellation at the proper time, copy thereof, and record shall be for the account of the obligor.

"Fourteenth: Each of the parties hereto, as far as the same is concerned, agree to the present deed in every respect as conformable to the terms agreed upon.

"It was so stated, executed and signed in the presence of witnesses Jose Nadal Grau and Oscar Souffront, residents of this district, of age, qualified and known to me. This deed has been read by me to the parties and to the witnesses upon their waiving the right to do so themselves, which I warned them they could do, its contents was ratified by the parties and they and the witnesses affixed their signatures,—in witness whereof and of everything stated, I, the notary, Certify. At this stage, it is set down by the parties that the sum referred to in the third paragraph of this deed as owed by Mrs. Elvira Olivieri Commins to the partnership Mario Mercado e Hijos amounting to $41,256.89, represents the total of the amount due up to date in every respect.

"(Sgd.) Elvira Olivieri.
A. Cortes.
Dr. J. Nadal Grau.
Oscar Souffront.

"Signed, signeted, sealed and paraphed:

F. Zapater."

Second: That Mrs. Belen Gonzalez, widow of Tous, in her own right and in behalf of the parties represented by her, and her major children appearing herein, have agreed with the partnership Mario Mercado e Hijos upon the assignment of the aforesaid mortgage credit and pursuant thereto they agree as follows:

First

Mr. Maria Mercado y Montalvo, as the sole managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, hereby conveys, renounces and assigns in favor of Mrs. Belen Gonzalez, widow of Tous, in the representation in which she appears in this execution and in her own right, and to Dona Ana Rosa Tous de Carrion, Dona Luz Belen Tous de Usera, Dona Alicia and Dona Celia Tous y Gonzalez, the mortgage credit constituted by the deed above transcribed, the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act and in my presence and that of the witnesses the four mortgage promissory notes above mentioned duly endorsed, to all of which, I, the notary, certify.

Second

It is hereby made known that in the mortgage credit above referred to and which has been the subject matter of the assignment in the present instrument, Dona Belen Gonzalez, widow of Tous, owns an interest amounting to $21,256.89, and the balance, that is, the sum of $20,000.00 is prorated share and share alike among all her major children represented by her in this transaction.

Third

The parties expressly agree that although it is true that in the said mortgage deed, which is the subject matter of this assignment, the rate of interest agreed upon is 9% annually, the fact is that in consideration of the obligation that will be hereinafter assumed by the partnership Mario Mercado e Hijos to pay the interest to be accrued by monthly installments at the end of each

month, said partnership Mario Mercado e Hijos shall be entitled to retain 3/4 of 1% annually of the aforesaid interest during the life of this mortgage, as a consideration, as above stated, of the obligation to be assumed in the next clause of this deed.

Fourth

The partnership Mario Mercado e Hijos binds itself to pay to the assignees in monthly installments at the end of each month the interest on the mortgage hereby assigned at the rate of 8-1/4% annually.

Fifth

The partnership Mario Mercado e Hijos, through its managing partner, Mr. Mario Mercado Montalvo, and the latter in his own behalf, hereby constitute themselves in solidary sureties, not only for the principal of the mortgage assigned hereby, but also for the amount of interest on said mortgage during all the time comprised between now and the payment in full of principal and interest.

Sixth

The parties expressly agree that in case of the assignor, the partnership Mario Mercado e Hijos, should fail to pay the proper interest at maturity of any of the monthly installments, said partnership shall not be considered to be in default and shall not be compelled to effect the payment until the expiration of thirty days from the time of said installment becoming due.

Seventh

The assignment set out in the first clause of this instrument is made for the consideration of $41,256.89 delivered in this act to Mr. Mario Mercado Montalvo as manager of the partnership Mario Mercado e Hijos and in my presence and that of the witnesses, to which I certify, by the assignees, in a certified check on the National City Bank for which sum he gives the proper release and acquittance.

Eighth

It is likewise stipulated and agreed that any tax, excise or impost that might be levied upon the principal of or interest on the mortgage the subject matter of this assignment, by either the Federal Government or the Insular Government, or any municipality, shall be paid for the account of and chargeable to the partnership Mario Mercado e Hijos.

Ninth

It is likewise agreed that the partnership Mario Mercado e Hijos shall see to it that payment is timely made of the taxes upon the estates encumbered by the mortgage that is hereby assigned, and in case of failure on the part of the mortgagor to pay the same, the partnership Mario Mercado e Hijos will pay them within the proper semester.

Tenth

The parties in their respective rights and representations accept the present deed as drafted, as conforming to the terms agreed upon by them; and I, the notary, in accordance with law, call their attention to their rights and duties under the law concerning this execution.

It is so stated and executed in my presence and that of the witnesses, legally qualified, domiciled in this district and known to me, Mr. Rafael Torres and Mr. Julio Mirailh.

The present deed has been read by the parties and the witnesses, in the exercise of their right as advisd by me, its contents was approved by the parties and all of them affixed their signatures before me the notary, who certify to everything set down.

(Sgd.) MARIO MERCADO MONTALVO.
BELEN G., widow of Tous Soto.
CELIA TOUS GONZALEZ.
ALICIA TOUS GONZALEZ.
LUZ B. TOUS DE USERA.
J. MIRAILH.
RAFAEL TORRES.

Signed, signeted, sealed and paraphed:

F. Zapater.

The following initials appear on all the folios of this deed: B.G.T. The proper internal revenue stamps are affixed hereto and cancelled. This is a true and faithful copy of its original to which I refer and which is on file in my current protocol of public instruments of this my notarial office under number marked at the head thereof. In witness whereof and at the request of interested party I issue the present copy which I sign, signet, paraph and seal in Ponce, Puerto Rico, on the same day, month and year of its execution.

(Signed, signeted, sealed and paraphed:

F. Zapater.

There is affixed hereto and cancelled a $5.00 internal revenue stamp, and all the folios have been stamped with the notarial seal and that of the Registry of Property.)

On the back of the last page the following appears: "A $0.50 internal revenue stamp is cancelled." Likewise there appears the imprint of a rubber stamp with the following legend: "Presented at 8:45 A.M. on this day. Entered on folio 77 of Vol. 164 of the Daybook. Ponce, P.R., May 11, 1933.

The Registrar: (Sgd.) M. Planellas."

Here the seal of the Registry of Property has been duly stamped. Further on it reads:

"A $0.50 internal revenue stamp cancelled in accordance with No. 7 of the Schedule of Fees."

"This instrument has been recorded having others on view with the curable defect that the purchaser Ana Rosa Tous y Gonzalez has not been legally represented in the execution thereof, mention of which being made on the margin of the description of each of the two estates covered thereby. There

are no liens upon the mortgage assigned. Ponce, May 16, 1933.

The Registrar: (Sgd.) Miguel Planellas."

There are affixed hereto and cancelled internal revenue stamps worth $114.00, and further down the following appears:

"There are affixed hereto and cancelled the following internal revenue stamps: two of $50.00 each; one of $10.00, and eight of $0.50 each, in compliance with No. 5 of the Schedule of Fees and the Political Code. Date *ut supra.*

(Sgd.) Miguel Planellas."

(On the margin of page 7 of this deed there is a note of the Registrar of Property which reads: "Volume 16 of Guayanilla, back of folio 24, estate No. 711, 12th record." This is on the margin of the estate described under No. One on the aforesaid page.")

(A notice appears on the margin of the record of the property described and marked No. Two, on page 9 of the said deed, reading as follows: "Volume 33 of Guayanilla, folio 201, estate No. 534 triplicate, 14th record.") (The following appears on the cover page: "Attorney Fernando Zapater Martinez, Attorney and Notary Public—No. 33— Assignment of Mortgage Credit—Executed by Mrs. Belen Gonzalez, widow of Tous, et als., and Mario Mercado Montalvo, as the attorney-in-fact of the partnership Mario Mercado e Hijos on May 9, 1933. Ponce, Puerto Rico.")

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen G. widow of Tous Soto—Ex-parte—Civ. No. 203—*In re:* Judicial Administration.

After a hearing at which oral and documentary evidence was heard, the court ordered a transcript of the stenographic notes and their submission to the district attorney for a written report thereon, and once this is done, the court will decide. (From Minutes Book No. 31, First Section, sitting of March 4, 1937,

presided by Hon. Judge Sepulveda. I Attest: (Sgd.) E. Gotay Purcell, Clerk.)

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez, Widow of Tous, as Mother with *Patria Potestas* Over the Minor Hector Tous Gonzalez and Guardian of Jose Tous Gonzalez, Incapacitated, Petitioner.—Ex Parte—Civil No. 203—*In re:* Judicial Authorization.

STENOGRAPHIC NOTES

On March 3, 1937, this case was called for the hearing of the evidence, the court being presided by Hon. Domingo Sepulveda, Judge. The petitioner was represented by her counsel, attorney Fernando Zapater Martinez.

Attorney: In conversation with the district attorney Perez Marchand we were advised by him to hold the hearing, to submit the evidence and to forward the stenographic notes to his office for a favorable report thereon by him.

Judge: I have already sent for the district attorney. What did he say?

Marshal Rodriguez: He is coming right away; he is hearing a testimony which will be over soon.

Judge: Did you say that that had been agreed upon?

Attorney: Yes.

Judge: Let us proceed.

Attorney: An interest in said mortgage amounting to $21,256.89 was subsequently assigned by Mario Mercado e Hijos to Mrs. Belen Gonzalez, widow of Tous, and the $20,000.00 balance was assigned to the nine children of Mr. Jose Tous Soto, there being allotted to each of said children the sum of $2,222.22-2/9. One of the children of Mr. Jose Tous Soto called Jose Tous Gonalez is incapacitated, whose guardian is the widow of Mr. Tous Soto, that is, the petitioner, and there is a minor son called Hector.

The mortgagor desires to cancel said mortgage, availing herself of a clause in the mortgage; and in order to be able to cancel such mortgage, authorization from the court is necessary for the

cancellation thereof as regards the incapacitated one and the minor, a deposit being effected in the office of the clerk of the amount corresponding to the minor and to the incapacitated one, respectively.

Judge: Let the evidence be submitted.

Petitioner's Evidence

Attorney: We are to submit in evidence deed No. 33 of March 9, 1933, executed before notary Fernando Zapater by virtue of which Mario Mercado e Hijos assigned a mortgage to Mrs. Belen Gonzalez, widow of Tous. Said mortgage was constituted to secure four promissory notes amounting to $41,256.89.

I want to take the stand because in this matter I am better posted than the widow of Tous Soto herself.

Judge: The deed is admitted.

(Mr. Zapater is sworn in.)

Verified Testimony of Attorney Fernando Zapater Martinez.

Witness: My name is Fernando Zapater. I am an attorney, domiciled in Ponce.

Judge: Of age.

Witness: I am over 21 years of age. I appear in the present case as the attorney of Mrs. Belen Gonzalez, widow of Tous Soto. I am well posted in all matters connected with the Heirs of Tous Soto because I was the notary who intervened in the inventory, appraisal and adjudication of the property. The estate of Mr. Tous Soto included the sum of $41,256.89 in cash, and was invested, with the authorization from this Court, in the purchase of a mortgage credit owned by Mario Mercado e Hijos for $41,256.89. The share of this mortgage corresponding to the widow of Tous Soto, Mrs. Belen Gonzalez, petitioner herein, was the sum of $21,256.89 and the balance of $20,000.00 was prorated among the children of Jose Tous Soto of which six are majors, one is a minor and one is incapacitated. The name of the incapacitated one is Jose Tous Gonzalez, who is represented by the petitioner herein, who was appointed guardian of the incapacitated

one and the name of the minor is Hector, who is not yet fourteen years old.

There is a clause in the mortgage, as appears from the deed submitted in evidence, to the effect that the mortgagor may at any time cancel the mortgage provided the interest for three months thereon is paid to the mortgagee. The mortgagor herein is ready to fulfill said clause of the deed and has required the Heirs of Tous Soto to cancel the mortgage. All the parties to the same who are of age are willing to cancel the same, the only thing needed is authorization from the Court to the guardian mother to appear in the proper deed of cancellation. The share belonging to the minor and to the incapacitated one is $2,222.22-2/9 each, and such amount is going to be deposited in the office of the clerk to be disposed of conformable to the interests of the minor, the incapacitated one, and to the authorization from the Court. That is all.

Judge: Do you think that that is for the benefit and utility of the Heirs?

Witness: I think that this is useful and beneficial because such sum of money could now be invested at a greater rate of interest in partial amounts than in such a large sum as $40,000.00, and a rate of interest of 9% could be secured, and which is not obtained now, and, moreover, a three-month interest in advance will be paid; and, besides, there is a clause entitling the mortgagor to a cancellation and if such cancellation is not made a suit would ensue which would cause inconvenience and expenses to the incapacitated one and the minor, and I think that it is to the advantage and benefit of the minor and the incapacitated one that the mortgage in the present case should be cancelled.

Judge: Any further statement to make?

Witness: That is all.

Judge: Any further evidence?

Attorney: That is the whole evidence.

Judge: Let the deed and the transcript of the stenographic notes

be attached to the record and submitted to the district attorney for a written report.

I, Jose Cruz Montero, court stenographer for the District Court for the Judicial District of Ponce, Puerto Rico, Do Hereby Certify:

That the foregoing is a true and faithful transcript of the stenographic notes taken by me during the hearing of Civil Case No. 203, Belen G., widow of Tous Soto, petitioner, *In re:* Judicial Authorization;—

And I Further Certify that said stenographic notes were faithfully and accurately taken and they faithfully and accurately represent the statements made at the hearing.

And by order of the Court, and for attaching to the record in said Civil Case No. 203, Belen Gonzalez Salicrup, widow of Tous Soto, *In re:* Judicial Authorization, I issue this certificate in Ponce, Puerto Rico, on this the 5th day of March 1937, for all legal purposes.

Court stenographer for the
District Court for the Judicial
District of Ponce, Puerto Rico.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez Salicrup, Widow of Tous, as Mother with *Patria Potestas* Over the Minor Hector Tous Gonzalez and Guardian of Jose Tous Gonzalez, Incapacitated, Petitioner.—Ex Parte—Civil No. 203—*In re:* Judicial Authorization.—

REPORT OF THE DISTRICT ATTORNEY

I, the undersigned district attorney, having examined the present record, hereby report to the Court that I have no objection to the granting of the petition in question.

Ponce, Puerto Rico, March 2, 1937.

(Sgd.) R. V. Pérez Marchand,
District Attorney.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez Salicrup, Widow of Tous, as Mother with *Patria Potestas* Over the Minor Hector Tous Gonzalez, and Guardian of Jose Tous Gonzalez, Incapacitated, Petitioner.—Ex Parte—Civil No. 203—*In Re:* Judicial Authorization.—

ORDER

Whereas: Mrs. Belen Gonzalez Salicrup, widow of Tous, appeared before this court through her attorney Fernando Zapater Martinez, and alleged: that petitioner is over 21 years of age; property owner; domiciled in Ponce and mother with *patria potestas* over the minor Hector Tous Gonzalez, 17 years old, who is property owner and domiciled in Ponce and guardian of Jose Tous Gonzalez, incapacitated, over 21 years of age, who is property owner, and a casual resident of San Juan, Puerto Rico, which office was accepted and was sworn in before this court by the petitioner as appears from the proper Registry of Guardianship.

Whereas: It is further alleged that by public deed No. 33 of May 9, 1933, executed before notary Fernando Zapater Martinez, recorded in Vol. 16 of Guayanilla, back of folio 24, estate No. 711, 12th record and in Vol. 33 of Guayanilla, folio 201, estate No. 534 triplicate, 14th record, Mr. Mario Mercado Montalvo, as managing partner of the agricultural civil partnership Mario Mercado e Hijos, domiciled in Guayanilla, Puerto Rico, and, moreover, in his own right, assigned to Mrs. Belen Gonzalez, widow of Tous, petitioner herein, in her own right and, moreover, as mother with *patria potestas* over her then minor children Belen-Maria, Gladys and Jorge; and Hector Tous Gonzalez still a minor, and as guardian of Jose Tous Gonzalez, incapacitated; Luz Belen, Ana Rosa, Celia and Alicia Tous Gonzalez, a mortgage credit constituted by public deed No. 13, executed in Mayaguez, on March 23, 1932, before notary Fernando Zapater Martinez, acting in the place of Mr. Jose Tous Soto, by Mrs. Elvira Olivieri Commins, upon one-half jointly owned interest in the immovables described as follows:

"Number One: A piece of rural property known as 'Juanita' lying in the 'Pueblo' and 'Quebrada' barrios within the municipal district of Guayanilla. It contains 481.77 cuerdas more or less, equivalent to 189 hectares, 35 ares and 45 centiares, partly flat land applied to sugar canes and partly hilly and wooded land. There is built thereon a dwelling frame house raised from the ground, with galvanized-iron roof, and a shed for storing produce. It is bounded: on the north by land of Rafael Lopez, of the 'Rufina' plantation belonging to Mario Mercado e Hijos, and the Heirs of Domingo Torres represented by Isabel Yordan; on the south by said 'Rufina' plantation; on the west by land of the 'San Rafael' plantation owned by the Heirs of Franceschi, by land of Andres Negroni and by land of Antonio Ramos. On the north (*sic*) by land of the latter, by land of the Heirs of Ramon Lopez, by land of Joaquin Lugo and by the road leading to 'Piedras Blancas' barrio, and on the opposite side by land of Antonio Llabres. Said estate is crossed by part of the railroad track.

"Number Two: A piece of rural property known as 'Los Indios' lying in the 'Indios' barrio within the municipal district of Guayanilla, with an area of 430 cuerdas, equivalent to 169 hectares, 69 centiares, applied to sugar canes, pastures, saltpeter works and woods. There is built thereon a frame house, roofed with galvanized iron and in part with shingles; another frame house, peon quarters, a house for overseers and some other buildings. It is bounded: on the north by the road leading from the 'Barina' barrio to the 'Indios' barrio of Guayanilla, by land of the sugar cane plantation owned by Trujillo & Mercado & Compania, now Mario Mercado e Hijos and by land of the Heirs of Juan Irizarry; on the east by land of Gabriel Garcia, by land of the Faro plantation owned at present by Mario Mercado e Hijos and formerly by Trujillo Mercado & Compania and by mangroves of the maritime zone; on the south by the Yauco river and

by land of the 'Mercedes' plantation owned by Lluberas Hermanos, and on the west by land of Ulises Olivieri and by land of the Heirs of Antonio Perez."

Whereas: It is likewise alleged: that said mortgage was constituted to secure four promissory notes payable to holder by indorsement, to mature all of them on March 23, 1939, and subscribed by said lady for the following amounts: Note No. 1 for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs; note No. 2 for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs; note No. 3 for $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs; and note No. 4 for $11,256.89, as principal, $3,000.00 for interest and $500.00 for costs. Said mortgage secures, in addition to the principal of the said notes, the sum of $11,100.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery, which notes were, by virtue of the foregoing assignment of mortgage credit, duly endorsed in favor of the Heirs of Jose Tous Soto, already mentioned.

Whereas: It is further alleged that the share of Mrs. Belen Gonzalez, widow of Tous, in said mortgage credit amounts to $21,256.89, and the balance, that is, $20,000.00 belongs in equal shares to all her children, majors and minors, by virtue of which the minor Hector Tous Gonzalez and the incapacitated one, Jose Tous Gonzalez, are entitled each to the sum of $2,222.22-2/9; that the mortgagor, pursuant to clause 9 of the said deed of mortgage, which provides that she may at any time before maturity, cancel said mortgage credit, has sought to cancel said mortgage credit, and the mortgagees, who are of age are ready to cancel the same and have ordered notary Fernando Zapater Martinez to draw up the proper deed.

Whereas: At a hearing on the above petition, with the appearance of the district attorney, all and everyone of the particulars stated were justified to the satisfaction of the court by means of

documentary and oral evidence, and the district attorney reported favorably thereon.

Wherefore: The court hereby authorizes Mrs. Belen Gonzalez Salicrup, widow of Tous, to appear before a notary and to execute the proper deed of cancellation of mortgage as to the shares held therein by the minor Hector Tous Gonzalez and the incapacitated one, Jose Tous Gonzalez, and orders that said shares in the principal of the said mortgage credit belonging to the minor and the incapacitated one above referred to, be deposited in the office of the clerk of this court, to be disposed of in accordance with further orders from this court.

Ponce, Puerto Rico, March 5, 1937.

(Sgd.) D. SEPULVEDA,
District Judge.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez Salicrup, Widow of Tous, as Mother with *Patria Potestas* Over the Minor Hector Tous Gonzalez and Guardian of Jose Tous Gonzalez, Incapacitated, Petitioner.—Ex Parte—Civil No. 203—*In Re:* Judicial Authorization.—

PETITION

Now comes petitioner Mrs. Belen Gonzalez Salicrup before this Hon. Court and through her undersigned attorney respectfully states:

1. That in the office of the clerk of this Hon. Court petitioner deposited the sum of $4,444.46 belonging, share and share alike, to her sons Hector Tous Gonzalez, minor, and Jose Tous Gonzalez, incapacitated.

2. That the aforesaid amount is not drawing any interest whatever.

3. That she encloses herewith a letter signed by the manager of the Credito & Ahorro Ponceno, Mr. Angel A. Sanz Padilla, from which it appears that said banking institution will pay in-

terest at the rate of 2% annually on any sum of money exceeding $2,000.00.

4. That by depositing the aforesaid sum in the Credito & Ahorro Ponceno, the petitioner would be paid 2% annually on the moneys at present deposited in the office of the clerk of this Court.

By Virtue Whereof she prays this Hon. Court to order the clerk of the Court to transfer from the account in the office of the clerk of this Court in the name of Hector Tous Gonzalez and Jose Tous Gonzalez to the Credito & Ahorro Ponceno, so that the sum so deposited amounting to $4,444.46 may draw as a profit interest at 2% annually, until said sum could be invested in some other way for the benefit of said minor and incapacitated one.

Ponce, Puerto Rico, May 7, 1937.

(Sgd.) F. ZAPATER,
Attorney fot petitioner.

I, Fernando Zapater Martinez, Do Solemnly Swear:

That I am petitioner's counsel in the present case; that I have drafted and read the above petition and that the facts therein set forth are true and personally known to me. That I make this declaration in the place of petitioner owing to her absence from this district.

(Sgd.) F. ZAPATER.

Sworn to and subscribed before me by Fernando Zapater Martinez, of age, attorney, domiciled in Ponce and married whom I certify to know personally in Ponce, Puerto Ri.

May 7, 1937.

E. Gotay Purcell, Clerk,
District Court of Ponce, P. R.

Served with copy this 7th day of May, 1937.

G. Pierluissi,
District Attorney.

Credito Y Ahorro Ponceno.—Founded in 1895.—Branches in Mayaguez, Yauco, Guayama, Cayey.—Cable Address:-"Credito"—Depositary for the United States—Depositary for Puerto Rico—Ponce, Puerto Rico.—April 29, 1937.—

Mrs. Belen G., widow of Tous Soto, Ponce, Puerto Rico.

My dear Madam:

We take pleasure to confirm hereby our verbal information that we should be glad to pay you 2% annually on any sum deposited by you in this bank, in our savings department, in excess of $1,000.00. We shall also be pleased to pay you this same rate of interest on any sums deposited by you in the same circumstances in behalf of your minor children.

We are, dear madam, your sincere friends,

(Sgd.) ANGEL A. SANZ, Manager.

In the District Court for the Judicial District of Ponce, Puerto Rico.—Belen Gonzalez Salicrup, Widow of Tous, as Mother with *Patria Potestas* Over the Minor Hector Tous Gonzalez and Guardian of Jose Tous Gonzalez, Incapacitated, Petitioner.—Ex Parte—Civil No. 203—*In Re:* Judicial Authorization.—

ORDER

Having considered the foregoing motion and in view of the conformity accorded to it by the district attorney and the written offer from the Credito y Ahorro Ponceno, in which said bank promises to pay 2% of interest annually upon any sum that petitioner may deposit therein, the court hereby orders that the moneys deposited in the office of the clerk of this court by Mrs. Belen Gonzalez Salicrup, as mother with *patria potestas* over the minor Hector Tous y Gonzalez and the incapacitated one, Jose Tous y Gonzalez, amounting to $4,444.46 in the name of said minor and said incapacitated one, be transferred by the clerk of this court to an investment account in the banking institution

"Credito y Ahorro Ponceno" in the name of Hector Tous Gonzalez and Jose Tous Gonzalez, share and share alike.

Ponce, Puerto Rico, May 7, 1937.

(Sgd.) R. H. Todd, Jr.,
District Judge.

(There is a cover page with the following legend: "Fernando Zapater—Attorney and Notary Public—Ponce, Puerto Rico—District Court for the Judicial District of Ponce, Puerto Rico—Case No. 203—Belen G., widow of Tous Soto—*In re:* Judicial Authorization—Fernando Zapater, Counsel for plaintiff.—Date of filing of complaint: March 4, 1937.—Date of inclusion of the case in the calendar: March 4, 1937.—Date of Judgment: March 5, 1937.

"Remarks: Judgment entered on March 6, 1937, on folio 166 of book 107 of civil judgments. 1,000 words. Rec. 295."

EXHIBIT 8 OF THE DEFENDANTS.

No. One. For $10,000.00. To become due on March 23, 1939. I promise to pay to the holder by indorsement of this promissory note on the 23rd day of March, 1939, the sum of Ten Thousand Dollars received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. One of a series of four, totalling $41,256.89. To secure the above sum, $2,700.00 for interest thereon and $500.00 for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called "Juanita", with an area of 481.77 cuerdas more or less, lying in the "Pueblo" and "Quebrada" barrios of the municipal district of Guayanilla, and the

other called "Los Indios", with an area of 430 cuerdas, lying in the "Indios" barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) ELVIRA OLIVIERI.

Affidavit No. 2146.—Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Mayaguez, Puerto Rico, whom I certify to know personally in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

(There is affixed hereto said notary's paraph, a $0.25 internal revenue stamp duly cancelled and the notarial seal stamped thereon.) (Over the text of this note and handwritten in ink diagonally the following appears: "This promissory note has been cancelled by virtue of a deed of cancellation of even date executed before me. Ponce, Puerto Rico, March 8, 1937.

(Sgd.) F. Zapater,
Notary Public."

There is stamped again next to the signature, the notarial seal and the paraph of said notary.)

(The following appears on the back of this promissory note: "(Sgd. Elvira Olivieri.—For value received. Pay to the order of Dona Belen Gonzalez, widow of Tous, Dona Belen-Maria, Gladys, Jorge, Hector, Jose, Celia and Alicia Tous y Gonzalez, Dona Luz Belen Tous de Usera and Dona Ana Rosa Tous de Carrion. Ponce, P.R., May 9, 1933.—Mario Mercado e Hijos, per (Sgd.) Mario Mercado, Manager.—Affidavit No. 2690.—Subscribed before me by Don Mario Mercado Montalvo, of age, a widower, domiciled in Ponce and manager of the partnership Mario Mercado e Hijos, whom I certify to know personally. Ponce, P.R., May 9, 1933.

(Sgd.) F. Zapater,
Notary Public.

(There is affixed hereto and cancelled a $0.25 internal revenue stamp, and stamped the notarial seal.)

No. Two. For $10,000.00. To become due on March 23, 1939. I promise to pay to the holder by indorsement of this promissory note on the 23rd day of March, 1939, the sum of Ten Thousand Dollars received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. Two of a series of four, totalling $41,256.89. To secure the above sum, $2,700.00 for interest thereon and $500.00 for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called "Juanita", with an area of 481.77 cuerdas more or less, lying in the "Pueblo" and "Quebrada" barrios of the municipal district of Guayanilla, and the other called "Los Indios", with an area of 430 cuerdas, lying in the "Indios" barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) ELVIRA OLIVIERI.

Affidavit No. 2147.—Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Mayaguez, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

(There is affixed hereto a $0.25 internal revenue stamp duly cancelled and the notarial seal stamped thereon, as well as the notary's paraph.) (Over the text of this note and handwritten in black ink diagonally the following appears: "This promissory note has been cancelled by virtue of a deed of cancellation of

even date executed before me. Ponce, Puerto Rico, March 8, 1937.

(Sgd.) F. Zapater,
Notary Public."

There is stamped again the notarial seal and the paraph of said notary.)

(The following appears on the back of this promissory note: "(Sgd.) Elvira Olivieri.—For value received. Pay to the order of Dona Belen Gonzalez, widow of Tous, Dona Belen-Maria, Gladys, Jorge, Hector, Jose, Celia and Alicia Tous y Gonzalez, Dona Luz Belen Tous de Usera and Dona Ana Rosa Tous de Carrion. Ponce, P. R., May 9, 1933.—Mario Mercado e Hijos, per: (Sgd.) Mario Mercado, Manager.—Affidavit No. 2691.—Subscribed before me by Don Mario Mercado Montalvo, of age, a widower, domiciled in Ponce and manager of the partnership Mario Mercado e Hijos, whom I certify to know personally. Ponce, P.R., May 9, 1933.

(Sgd.) F. Zapater,
Notary Public.

(There is affixed hereto and cancelled a $0.25 internal revenue stamp, and stamped the notarial seal and the notary's paraph.)

No. Three. For $10,000.00. To become due on March 23, 1939. I promise to pay to the holder by indorsement of this promissory note on the 23rd day of March, 1939, the sum of Ten Thousand Dollars received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. Three of a series of four, totalling $41,-256.89. To secure the above sum, $2,700.00 for interest thereon and $500.00 for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two

jointly owned estates, one of them called "Juanita", with an area of 481.77 cuerdas more or less, lying in the "Pueblo" and "Quebrada" barrios of the municipal district of Guayanilla, and the other called "Los Indios", with an area of 430 cuerdas, lying in the "Indios" barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23, 1932.

(Sgd.) ELVIRA OLIVIERI.

Affidavit No. 2148.—Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner, and domiciled in Mayaguez, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

(There is affixed hereto said notary's paraph, a $0.25 internal revenue stamp duly cancelled and the notarial seal stamped thereon.) (Over the text of this note and handwritten in black ink diagonally the following appears: "This promissory note has been cancelled by virtue of a deed of cancellation of even date executed before me. Ponce, Puerto Rico, March 8, 1937.

(Sgd.) F. Zapater,
Notary Public."

There is stamped again next to the signature, the notarial seal and the paraph of said notary.)

(The following appears on the back of this promissory note: "(Sgd.) Elvira Olivieri.—For value received. Pay to the order of Dona Belen Gonzalez, widow of Tous, Dona Belen-Maria, Gladys, Jorge, Hector, Jose, Celia and Alicia Tous y Gonzalez, Dona Luz Belen Tous de Usera and Dona Ana Rosa Tous de Carrion. Ponce, P.R., May 9, 1933. Mario Mercado e Hijos, per: (Sgd.) Mario Mercado, Manager.—Subscribed before me by Don Mario Mercado Montalvo, of age, a widower, domiciled in Ponce and manager of the partnership Mario Mercado e Hijos, whom I

certify to know personally. Ponce, P.R., May 9, 1933.—Affidavit No. 2692—(Sgd.) F. Zapater, Notary Public."

(There is affixed hereto and cancelled a $0.25 internal revenue stamp, and stamped the notarial seal as well as said notary's paraph.)

No. Four. For $11,256.89. To become due on March 23, 1939. I promise to pay to the holder by indorsement of this promissory note on the 23rd day of March, 1939, the sum of Eleven Thousand Two Hundred and Fifty-Six Dollars and 89/100 received to my entire satisfaction as a loan. This amount will bear interest at 9% annually until fully paid, payable semi-annually at the expiration of each semester. This is promissory note No. Four of a series of four, totalling $41,256.89. To secure the above sum, $3,000.00 for interest thereon and $500.00 for costs, expenses, disbursements and attorney's fees I have executed a voluntary mortgage in favor of the holder by indorsement of said promissory notes in public deed No. 13 of even date before notary Fernando Zapater, acting in the place of Jose Tous Soto, upon a one-half interest belonging to me in two jointly owned estates, one of them called "Juanita", with an area of 481.77 cuerdas more or less, lying in the "Pueblo" and "Quebrada" barrios of the municipal district of Guayanilla, and the other called "Los Indios", with an area of 430 cuerdas, lying in the "Indios" barrio of the municipal district of Guayanilla, Puerto Rico. Mayaguez, Puerto Rico, March 23 1932.

(Sgd.) ELVIRA OLIVIERI.

Affidavit No. 2149.—Subscribed before me by Mrs. Elvira Olivieri Commins, of age, a divorcee, property owner and domiciled in Mayaguez, Puerto Rico, whom I certify to know personally, in Mayaguez, Puerto Rico, on March 23, 1932.

(Sgd.) F. Zapater,
Notary Public.

(There is affixed hereto a $0.25 internal revenue stamp duly cancelled and the notarial seal stamped thereon as well as the

notary's paraph.) (Over the text of this note and handwritten in black ink diagonally the following also appears: "This promissory note has been cancelled by virtue of a deed of cancellation of even date executed before me. Ponce, Puerto Rico, March 8, 1937. (Sgd.) F. Zapater, Notary Public." There are duly stamped the paraph and the notarial seal of said notary.)

(The following appears on the back of this promissory note: "(Sgd.) Elvira Olivieri.—For value received. Pay to the order of Dona Belen Gonzalez, widow of Tous, Dona Belen-Maria, Gladys, Jorge, Hector, Jose, Celia and Alicia Tous y Gonzalez, Dona Luz Belen Tous de Usera and Dona Ana Rosa Tous de Carrion. Ponce, P.R., May 9, 1933. Mario Mercado e Hijos, per: (Sgd.) Mario Mercado, Manager.—Subscribed before me by Don Mario Mercado Montalvo, of age, a widower, domiciled in Ponce and manager of the partnership Mario Mercado e Hijos, whom I certify to know personally. Ponce, P.R., May 9, 1933.

(Sgd.) F. Zapater,
Notary Public.

Affidavit No. 2693.

(There is affixed hereto and cancelled a $0.25 internal revenue stamp, and stamped the notarial seal and the notary's paraph.)

EXHIBIT 9 OF THE DEFENDANTS.

Ponce, Puerto Rico, November 7, 1939.

Registrar of Property for the Ponce District, P.R.—

Sir: In behalf of Mr. Manuel Francisco Lluberas Pasarell, and as his attorney, I beg of you to please furnish me with a verified literal copy of the entry which gave rise to deed No. 33 of May 9, 1932, executed before notary Fernando Zapater Martinez in connection with estate No. 711 duplicate, record 12 on the back of folio 24, of Volume 16 of Guayanilla and with estate No. 534 quadruplicate, record 14 in folio 201 of Volume 33 of Guayanilla.

I likewise beg of you to certify to the following:

(A) If it appears from your registry whether upon execution

of the deed of assignment by the partnership Mario Mercado e Hijos to Dona Belen Gonzalez Salicrup, widow of Tous Soto, and her children Ana Rosa Tous de Carrion, Luz Belen Tous de Usera, Alicia, Celia, Belen-Maria, Gladys and Jorge and Hector Tous y Gonzalez, said assignor partnership Mario Mercado e Hijos, or somebody other than said assignor, reserved to itself the option to purchase and to lease in connection with the record which gave rise to the mortgage referred to in record 12 of said estate No. 534 duplicate, on the back of folio 152 of Volume 33 of Guayanilla and the 10th record of estate No. 711 duplicate, on the back of folio 22 of Volume 16 of Guayanilla.

(B) If upon the cancellation of the mortgage referred to in record 16 of estate No. 534 quadruplicate, on the back of folio 187 of Vol. 36 of Guayanilla, and referred to in the 12th record of estate No. 711 duplicate, on folio 1 of Volume 34 of Guayanilla, there was kept alive in any form, according to your registry, said clause of option to purchase and lease referred to in the 12th record of estate No. 534 duplicate already mentioned and the 10th record of estate No. 711 duplicate, already mentioned.

I enclose internal revenue stamps worth $4.00 to cover any fees required to this effect or any other that might be required by law.

Respectfully,

(Sgd.) LEOPOLDO TORMES,
Attorney for Mr. Manuel Francisco Lluberas Pasarell.

(There is stamped hereon the seal of the registry of property.)

R-723. Aug. 7, 1939. 10,000.

Department of Justice of Puerto Rico.
Registry of Property Ponce, P.R.

I, Miguel Planellas Yanez, Registrar of Property of Ponce, Puerto Rico, and its Mortgage District, Do Hereby Certify:

1. That the records entered by reason of the copy of deed No. 33, executed on May 9, 1932, before notary Fernando Zapater

Martinez, referred to in the foregoing application, literally transcribed read as follows:

(a) 14th record of estate No. 534 triplicate, on folio 201 of Volume 33 of Guayanilla:

"14th. Rural: Estate known as 'Los Indios', described in its previous record 10 just as in the instrument presented. There are no liens upon the credit the subject matter of this entry. The agricultural civil partnership Mario Mercado e Hijos, domiciled in Guayanilla, Puerto Rico, known as Mario Mercado e Hijos, acquired a mortgage credit upon a 1/2 undivided joint interest in this estate and in that referred to on the margin, amounting to $41,256.89 as principal, the value of four promissory notes, $11,000.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery, said jointly owned interest in this estate being answerable for the sum of $28,877.81 as principal, $7,770.00 for interest and $1,400.00 for costs and other expenses, as appears from the 12th record, *supra*. By deed No. 33, executed in Ponce, on May 9, 1933, before notary Fernando Zapater Martinez, Mr. Mario Mercado y Montalvo, of age, a widower, property owner, domiciled in Ponce, acting in his capacity as the only managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, assigned, renounced and transferred in favor of Mrs. Belen Gonzalez, widow of Tous, of age, property owner, domiciled in Ponce, and of her minor children, under the *patria potestas* of said widow and called Belen Maria, Gladys, Jorge and Hector Tous y Gonzalez, who are, respectively, 20, 19, 17 and 13 years of age, property owners, domiciled in Ponce; in favor of Don Jose Tous Gonzalez, single, of age, property owner, residing at present in San Juan, Puerto Rico; in favor of Dona Luz Belen Tous Gonzalez, married to Don Vicente Usera, Jr., of age, property owner, domiciled in Ponce; in favor of Dona Ana Rosa Tous Gon-

zalez, married to Don Jose B. Carrion, domiciled in San Juan, of age, property owner; and in favor of Dona Celia and Alicia Tous y Gonzalez, both of age, property owners, unmarried, domiciled in Ponce, said mortgage credit upon the said jointly owned interest in said estate and the one mentioned on the margin, the assignor subrogating the assignees to its rights in the same degree and priority, and delivering to them in the act of the execution of the aforesaid deed and in the presence of the notary and of the witnesses, the four mortgage promissory notes already mentioned, duly indorsed, attested to by the notary before whom the deed in question was executed, in which it is set down that the assignment of said mortgage deed is prorated as follows: There is assigned to Dona Belen Gonzalez, widow of Tous, the sum of $21,256.89, and the balance, that is, the sum of $20,000.00, in equal shares, to all her children, the other assignees mentioned above. The consideration for this assignment was the sum of $41,256.89, which Don Mario Mercado y Montalvo, in his capacity as manager of the partnership Mario Mercado e Hijos, received upon the execution of the deed herein referred to and in the presence of the attesting notary, who certified to the delivery, and of the witnesses, from the assignees, in a certified check on the National City Bank. It is expressly agreed between the parties that although in the deed of constitution of mortgage, assigned herein, the rate of interest stipulated is 9% annually, it is a fact that as a consideration for the obligation to be assumed further on by the partnership Mario Mercado e Hijos to pay in monthly installments at maturity the interest to be accrued, that said partnership Mario Mercado e Hijos shall be entitled to retain 3/4 of 1% annually of the aforesaid interest during the life of this mortgage. The partnership Mario Mercado e Hijos binds itself to pay by monthly installments payable at the end of each month to the assignees the interest on the mortgage so assigned at the rate

of 8-1/4% annually. Mr. Mario Mercado y Montalvo, in his own behalf and as the managing partner of the partnership Mario Mercado e Hijos, becomes a solidary surety, both as regards the principal of the mortgage hereby assigned as well as the amount of interest on said mortgage, for the whole time between the date of the deed referred to, until said principal and interest are fully paid. It is expressly agreed between the parties that should the assignor, Mario Mercado e Hijos, fail to pay the proper interest at maturity of any of the monthly installments thereof, said Mario Mercado e Hijos shall not be understood to be in default and shall not be called upon to effect the payment until after the lapse of thirty days from maturity of each monthly installment. It is likewise stipulated and agreed that any tax, excise or impost to be assessed upon the principal or interest of the mortgage hereby assigned, by the federal or insular governments or any municipality, shall be for the account of and chargeable to the partnership Mario Mercado e Hijos. It is likewise agreed that the partnership Mario Mercado e Hijos shall see to it that the proper taxes upon this estate and the one mentioned on the margin, shall be timely paid, and in the event that the mortgagor fails to pay the same, the partnership Mario Mercado e Hijos shall satisfy the same within the proper semester. Dona Belen Gonzalez, widow of Tous, who besides appearing at the execution of the deed in question in her own behalf, appeared also as mother with *patria potestas* over her minor children called Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, and, moreover, as the guardian of Don Jose Tous Gonzalez, was duly authorized to appear at said assignment in her latter capacities by order of the District Court of Ponce made by Judge D. Sepulveda on May 5, 1933, in civil case No. 7,850, a certified copy of which, issued by A. Maldonado, deputy clerk of the District Court of Ponce, acting in the place of clerk E. Gotay Purcell, on May 5, 1933, is on view. The deed of

constitution of said partnership Mario Mercado e Hijos, No. 36, executed in Ponce on June 13, 1916, before notary Antonio F. Castro, gave rise to record 29 of estate No. 1 triplicate, on the back of folio 41 of Volume 74 of Ponce and the deed of modification and extension of said partnership, No. 99, executed on June 11, 1926, before notary Jose Tous Soto, was had on view when entering record 35 of estate No. 1 quadruplicate, on folio 10 of Volume 241 of Ponce. The following appears from a certificate issued on May 10, 1933, by notary Fernando Zapater Martinez: That he deposited on the same day in the post office of Ponce, enclosed in an envelope with the proper postage, a copy of the deed of assignment and a copy of the notice of assignment, addressed to the mortgagor Dona Elvira Olivieri Commins at her residence in Mayaguez, Puerto Rico. It is further set down that the assignee Ana Rosa Tous y Gonzalez was represented at the execution thereof by her verbal agent Luz Belen Tous y Gonzalez. By virtue of which Dona Belen Gonzalez, widow of Tous, and her children Belen-Maria, Gladys, Jorge, Hector, Jose, Luz Belen, Ana Rosa, Celia and Alicia Tous y Gonzalez, record in their favor the aforesaid mortgage credit upon a 1/2 joint interest in this estate which they acquired by assignment, mention being made of the curable defect of the failure of the assignee, Ana Rosa Tous y Gonzalez, being legally represented at the execution. The foregoing appears from the registry and from the above instruments which were presented in this office at 8:45 A.M. of May 11, instant, as appears from the entry of presentation on folio 77 of Volume 164 of the Daybook. The notice of assignment is on file in the record of public and private instruments and marked 77. The foregoing agrees with the contents of the registry and papers filed, as witness my signature affixed in Ponce, on May 16, 1933. Fees $72.00, No. 5 of the Schedule of Fees.

(Sgd.) Miguel Planellas.

There is a notice on the margin which reads: 'The other estate is recorded on the back of folio 24 of Volume 16 of Guayanilla, estate No. 711, 12th record. Ponce, May 16, 1933. Planellas.' The mortgage that gave rise to the foregoing 14th record is fully cancelled by the 16th record following. Ponce, March 20, 1937. Planellas."

(b) The 12th record of estate No. 711 entered on the back of folio 24 of Volume 16 of Guayanilla, literally transcribed, reads as follows:

"12th. Rural. Estate described in the foregoing first record just as the same is described in the document presented in which this estate is mentioned by the name of 'Juanita'. There are no liens upon the mortgage credit the subject matter of this entry. The agricultural civil partnership Mario Mercado e Hijos, domiciled in Guayanilla, Puerto Rico, known as Mario Mercado e Hijos, acquired a mortgage credit upon a 1/2 undivided joint interest in this estate and in that referred to on the margin, amounting to $41,256.89 as principal, the value of four promissory notes, $11,100.00 for interest and $2,000.00 for costs, expenses, disbursements and attorney's fees in case of judicial recovery, said jointly owned interest in this estate being answerable for the sum of $12,379.08 as principal, $3,330.00 for interest and $600.00 for costs and other expenses, as appears from the 10th record, *supra*. By deed No. 33, executed in Ponce, on May 9, 1933, before notary Fernando Zapater Martinez, Mr. Mario Mercado y Montalvo, acting in his capacity as the only managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, assigned, renounced and transferred in favor of Mrs. Belen Gonzalez, widow of Tous, of age, property owner, domiciled in Ponce and of her minor children, under the *patria potestas* of said widow and called Belen Maria, Gladys, Jorge and Hector Tous y Gonzalez, who are, respectively, 20, 19, 17 and 13 years of age, property owners,

domiciled in Ponce; in favor of Don Jose Tous Gonzalez, single, of age, property owner, residing at present in San Juan, Puerto Rico; in favor of Dona Luz Belen Tous Gonzalez, married to Don Vicente Usera, Jr., of age, property owner, domiciled in Ponce; in favor of Dona Ana Rosa Tous Gonzalez, married to Don Jose B. Carrion, domiciled in San Juan, of age, property owner; and in favor of Dona Celia and Alicia Tous Gonzalez, both of age, property owners, unmarried, domiciled in Ponce, said mortgage credit upon the said jointly owned interest in said estate and the one mentioned on the margin, the assignor subrogating the assignees to its rights in the same degree and priority, and delivering to them in the act of the execution of the aforesaid deed and in the presence of the notary and of the witnesses, the four mortgage promissory notes already mentioned, duly indorsed, attested to by the notary before whom the deed in question was executed, in which it is set down that the assignment of said mortgage deed is prorated as follows: There is assigned to Dona Belen Gonzalez, widow of Tous, the sum of $21,256.89, and the balance, that is, the sum of $20,000.00, in equal shares, to all her children, the other assignees mentioned above. The consideration for this assignment was the sum of $41,256.89, which Don Mario Mercado y Montalvo, in his capacity as manager of the partnership Mario Mercado e Hijos, received upon the execution of the deed herein referred to and in the presence of the attesting notary, who certified to the delivery, and of the witnesses, from the assignees, in a certified check on the National City Bank. Dona Belen Gonzalez, widow of Tous, who besides appearing at the execution of the deed in question in her own behalf, appeared also as mother with *patria potestas* over her minor children called Belen-Maria, Gladys, Jorge and Hector Tous y Gonzalez, and, moreover, as the guardian of Don Jose Tous Gonzalez, was duly authorized to appear at said assignment in her latter capacities by order of the

District Court of Ponce made by Judge D. Sepulveda on May 5, 1933, in civil case No. 7,850. It is further set down that the assignee Ana Rosa Tous y Gonzalez was represented at the execution thereof by her verbal agent Luz Belen Tous y Gonzalez. The above appears from the registry and from the aforesaid instruments mentioned at length in the 14th record of estate No. 534 triplicate, entered on folio 201 of Volume 33 of Guayanilla. By virtue of which Dona Belen Gonzalez, widow of Tous, and her children Belen-Maria, Gladys, Jorge, Hector, Jose, Luz Belen, Ana Rosa, Celia and Alicia Tous y Gonzalez, record in their favor the aforesaid mortgage credit upon a 1/2 joint interest in this estate which they acquired by assignment, mention being made of the curable defect of the failure of the assignee, Ana Rosa Tous y Gonzalez, being legally represented at the execution. Ponce, May 16, 1933. Fees $41.50, No. 5 of the Schedule of Fees.

(Sgd.) Planellas.

There is a notice on the margin reading as follows: 'The other estate is registered on folio 201 of Vol. 33 of Guayanilla, Estate No. 534 Duplicate, 14th record. Ponce, May 16, 1933. Planellas.'"

2. That the entries made by virtue of the copy of deed No. 47, executed on March 8, 1937, before notary Fernando Zapater Martinez, literally transcribed, are as follows:

(a) 16th record of Estate No. 534 Quadruplicate, on the back of folio 187 of Volume 36 of Guayanilla:

"16th. The mortgage that gave rise to the foregoing records 12 and 14, upon a 1/2 of this estate and another one, for the sum of $41,256.89, embodied in four promissory notes, enlarged to $11,100.00 for interest and $2,000.00 for costs and other disbursements, one of these estates being answerable for $28,877.81 as principal, $7,700.00 for interest

and $1,400.00 for costs and other expenses, is hereby fully cancelled, pursuant to the wish and consent of the creditors Dona Belen Gonzalez Salicrup, widow of Tous, in her own right and in representation of her minor son Hector Tous y Gonzalez, 17 years of age, single, property owner, domiciled in Ponce, and, moreover, as guardian of his other son, Jose Tous Gonzalez, incapacitated, duly authorized by order of the District Court of Ponce, made on March 5, 1937, by Judge D. Sepulveda in civil case No. 203, literally transcribed in the deed referred to by me, and pursuant further to the consent of the other creditors Dona Luz Belen, Dona Ana Rosa, Dona Alicia, Dona Celia, Dona Belen Maria and Don Jorge Tous Gonzalez, the first three named above with the express consent of their respective husbands Don Vicente Usera, Jr., Don Jose B. Carrion and Don Ignacio Maldonado, the latters also of age and present at the execution, inasmuch as the aforesaid creditors received the mount of the aforesaid mortgage credit in the following manner: Dona Belen Gonzalez Salicrup, widow of Tous, in her own behalf and with the conformity of other creditors, of age, a check for the sum of $37,812.43, on the Credito y Ahorro Ponceno, Yauco branch, made out by Mr. Francisco Lluberas; she also received, made out to the name of the clerk of the District Court of Ponce, a check upon the same bank, made out by the same person, for $4,444.46, covering the shares belonging to the minor Hector Tous Gonzalez and the incapacitated one, Jose Tous Gonzalez, in the aforesaid mortgage credit, which check Mrs. Gonzalez Salicrup deposited in the office of the clerk of the District Court of Ponce. Both items amount to the $41,256.89 as the principal of the aforesaid mortgage; all the said creditors acknowledging that the interest on said mortgage has been fully paid up to date. In the act of the execution of the deed to which I refer, Mrs. Belen Gonzalez Salicrup, widow of Tous, delivered to the attesting notary the four promissory notes representing the

principal of said mortgage to be rendered worthless and this was done by the notary across the face thereof, the following: 'This promissory note has been cancelled by virtue of a deed of cancellation of even date executed before me. Ponce, Puerto Rico, March 8, 1937. (Sgd.) F. Zapater, Notary Public.' This appears from the registry and from a copy of deed No. 47, executed in Ponce on March 8, 1937, before notary Fernando Zapater Martinez, presented in this office at 2:30 P.M., of March 10, instant, as evidenced by the entry on folio 31 of Volume 186 of the Daybook. And as the aforesaid conforms to the entry in the registry and the document presented, I sign this certificate in Ponce, March 20, 1937. Fees $48.00, No. 3 of the Schedule of Fees.

(Sgd.) Miguel Planellas."

(b) The note on the margin of the 12th record of estate No. 711 duplicate, on folio 1 of Volume 34 of Guayanilla, reads as follows:

"The mortgage that gave rise to the within record 12 upon a 1/2 interest in this estate and another one, is hereby fully cancelled pursuant to the wish and consent of the creditor Dona Belen Gonzalez Salicrup, widow of Tous, in her own right and in representation of her minor son Don Hector Tous Gonzalez, and, moreover, as guardian of her other son Don Jose Tous Gonzalez, incapacitated, and pursuant further to the consent of the other creditors Dona Luz Belen, Dona Ana Rosa, Dona Alicia, Dona Celia, Dona Belen Maria, Dona Gladys and Don Jorge Tous Gonzalez, the first three named, with the express consent of the husbands Don Vicente Usera, Jr., Don Jose B. Carrion and Don Ignacio Maldonado, inasmuch as the aforesaid mentioned creditors received the amount of the said mortgage credit in the following manner: Dona Belen Gonzalez Salicrup, widow of Tous, in her name and having first secured the consent of the other major creditors, a check for $36,812.43, upon the Credito y Ahorro

Ponceno, Yauco branch, made out by M. Francisco Lluberas; she also received another check made out to the name of the clerk of the District Court of Ponce, on the same bank, by the same party, for $4,444.46, representing the shares corresponding to the minor Hector Tous Gonzalez and to the incapacitated one, Jose Tous Gonzalez, in the aforesaid mortgage credit, which check was deposited by said Mrs. Gonzalez Salicrup in the office of the clerk of the District Court of Ponce, both such items making up the $41,256.89, as the principal of the aforesaid mortgage and it has been acknowledged by said creditors that the interest on the mortgage has been fully paid up to date. In the act of the execution of the deed referred to, Mrs. Belen Gonzalez Salicrup, widow of Tous, delivered to the attesting notary the four promissory notes representing the principal of said mortgage to be rendered worthless and this was done by said notary. This appears from the registry and from deed No. 47, executed in Ponce, on March 8, 1937, before notary Fernando Zapater Martinez, referred to at length in record 16 of the estate No. 534 quadruplicate, recorded on the back of folio 187 of Vol. 36 of Guayanilla. Ponce, March 20, 1937. Fees $10.00, No. 3 of the Schedule of Fees.

(Sgd.) Planellas."

3. That it does not appear from the records just transcribed, to which the aforesaid deeds gave rise, that the partnership Mario Mercado e Hijos, or anybody else, has reserved to itself the option to purchase and lease referred to in the record of the mortgage which has been assigned and cancelled.

4. That this certificate does not cover any other particulars because the interested parties has not so requested.

In witness whereof and at the request of Attorney Leopoldo Tormes, I issue the present certificate in Ponce, Puerto Rico, on this the 10th of November, 1939.

(Sgd.) MIGUEL PLANELLAS YANEZ,
Registrar of Property, Ponce, Puerto Rico.

(The following internal revenue stamps are affixed and cancelled on the back of this paper: 4 stamps of $1.00 each; 3 stamps of $0.50 each; one $0.25 stamp; a $0.10 stamp and another $0.05 stamp.)

(There has been duly stamped hereon the seal of the Registry of Property and underneath the following appears: "Cancelled 4 $1.00 stamps; 3 $0.50 stamps; a $0.25 stamp, a $0.10 stamp; a $0.05 stamp. No. 6 of the Schedule of Fees. Ponce, Puerto Rico, November 10, 1939. The Registrar: (Sgd.) Miguel Planellas.")

(There is a cover page with the following legend: "R-176. July 14, 1937, 2,000. Department of Justice of Puerto Rico. Registry of Property, Ponce, P.R.—Certificate concerning properties Nos. 711 and 534 recorded on folios 24 back and 201 of Volumes 16 and 33 of Guayanilla.

"This copy was issued on November 10, 1939 at the request of Attorney Leopoldo Tormes Garcia." (The seal of the Registry of Property is stamped hereon.)

I, Justo M. Bodon, court stenographer of the District Court for the Judicial District of Ponce, Puerto Rico, do hereby certify:

That the foregoing is a true and faithful transcription of the documentary evidence submitted by both sides in cases Nos. 311 and 312, entitled Mario Mercado e Hijos *v.* Elvira Olivieri Commins et als., and Mario Mercado e Hijos *v.* Elvira Olivieri Commins and Emilio Blasini Totti, *In re:* Rescission of Contract of Sale and other particulars, and Rescission of Lease and other particulars, respectively.

And for the purpose of the appeals taken to the Supreme Court of Puerto Rico from the judgments entered in said cases, I issue this certificate in Ponce, Puerto Rico, on this the 10th of December, 1941.

JUSTO M. BODON,
Court Stenographer of the District Court of Ponce.

Received February 19, 1942, 11:50 A.M. Supreme Court of Puerto Rico.

IN THE DISTRICT COURT FOR THE JUDICIAL DISTRICT OF PONCE, P. R.

Civil No. 311.

Mario Mercado e Hijos, Plaintiff,

v.

Elvira Olivieri Commins, et als., Defendants.

In re: Rescission of Contract of Sale and other particulars.

Civil No. 312.

Mario Mercado e Hijos, Plaintiff,

v.

Elvira Olivieri Commins, et als., Defendants.

In re: Rescission of Lease and other particulars.

APPROVAL OF THE TRANSCRIPT OF THE EVIDENCE.

I, Domingo Sepulveda, retired judge of the District Court for the Judicial District of Ponce, Puerto Rico, do hereby certify:

That I am the judge who presided the trial of the above entitled cases, which, upon stipulation by the parties, approved by the court, were submitted upon the same transcript of the evidence; that I am the judge who entered the judgments in the same; that the foregoing transcript of evidence, which contains all the amendments suggested and admitted by the court, is a true and faithful transcription and contains the whole evidence heard, as well as the acts, statements and orders of the court, and incidents of the trial, and the objections and exceptions taken by counsel on both sides.

And in order that the same become part of the judgment roll for the purpose of the appeals taken from the judgments, I approve, sign and certify said transcript in Ponce, Puerto Rico, on the 9th of February, 1942.

D. SEPULVEDA,
District Judge, retired.

On February 19, 1942, I served notice on F. Ochoteco, P. M. Porrata, L. Lopez de V., L. Tormes and J. Sabater of the filing of the present case on February 19, 1942.

JOAQUIN LOPEZ,
Secretary-Reporter, Supreme Court of P.R.
Per: F.V.

IN THE SUPREME COURT OF PUERTO RICO.

8501.

Mario Mercado e Hijos, Plaintiff and Appellant,

v.

Elvira Olivieri Commins et al., Defendants and Appellees.

Rescission of Sale and other particulars.

8502.

Mario Mercado e Hijos, Plaintiff and Appellant,

v.

Elvira Olivieri Commins and Emilio Blasini Totti, Defendants and Appellees.

Rescission of Lease and other particulars.

Appeals from the District Court of Ponce.

OPINION OF THE COURT

DELIVERED BY MR. CHIEF JUSTICE DEL TORO.

San Juan, Puerto Rico, July 31, 1942.

The fundamental questions involved in these appeals are the same. It is therein sought to determine the scope of a certain contractual clause and its application in connection with other contracts entered into, namely, one of sale and one of lease, in accordance with the facts and the law.

Such questions have been three times submitted to this court, the first time in an action of ejectment, the second time in motions to dismiss on the ground of frivolity, of the appeals taken from judgments which settled the same in a certain way rendered in

ordinary actions, and the third time in deciding the same appeals on their merits.

In our judgment in the ejectment proceedings we stated that ejectment was not the proper remedy for disposing of them and affirmed the judgment appealed from. Lluberas *v.* Mario Mercado e Hijos, 55 P.R.R. 39. In our decision of the motion to dismiss we held that they were not plainly frivolous. We must finally determine them here, thus putting an end to the litigation.

The actions were commenced in the District Court of Ponce, by Mario Mercado e Hijos on the same day—April 7, 1937—that for the rescission of sale against Elvira Olivieri, Manuel Francisco Lluberas and others, and that for the rescission of lease against the same Elvira Olivieri and Emilio Blasini. We decided them in judgments dated October 6, 1941 in a single opinion.

In seeking the rescission of the contract of sale entered into between defendant Mrs. Olivieri and the Lluberas people, and its subrogation to the latter's rights, it was substantially alleged in the complaint by the plaintiff that Mrs. Elvira Olivieri executed four promissory notes to holder negotiable by indorsement, secured by a mortgage upon her undivided joint half interests in the estates Juanita and Indios bounded by land belonging to the plaintiff in the municipal district of Guayanilla.

That in the same deed in which was embodied the mortgage to secure the promissory notes, Mrs. Elvira Olivieri acknowledged to be indebted to plaintiff Mario Mercado e Hijos in the sum of $41,256.89 and the latter agreed to accept the notes in payment of the aforesaid indebtedness. That it was further agreed, as part consideration of the contract that Elvira Olivieri bound herself to grant the plaintiff priority for the sale and lease of her condominiums on the same price and conditions so long as the mortgage was in force, and that in case of a sale in violation of such agreement, the plaintiff became empowered to exercise an action of redemption and that it was also agreed in said deed that the actual division of her joint interests in the estates Juanita and Indios could not be effected without the consent of the part-

nership Mario Mercado e Hijos as long as the promissory notes were not cancelled.

It is further alleged that plaintiff assigned the total of the mortgage notes to the Heirs of Jose Tous Soto and that when making the said assignment it was agreed with the aforesaid heirs that the plaintiff partnership would reserve to itself—as it did reserve—the right of option and redemption referred to.

That the assignment of the mortgage notes was effected on May 9, 1933, and on August 21, 1936, defendant Mrs. Elvira Olivieri and her sister Santia carried out the actual division of their jointly owned interests on the mortgaged properties, and that pursuant to the deed of mortgage, the partnership Mario Mercado e Hijos appeared in order to consent to the said division.

The preliminary facts being thus established, it is further alleged in the complaint that said defendants conspired among themselves with the deliberate purpose of defrauding the plaintiff and while the option clause which is transcribed in full was still effective they sold the properties adjudicated to Mrs. Elvira Olivieri in payment of her condominiums, without notifying the plaintiff as to any proposals to buy it, all the defendants being aware of the right of option held by plaintiff Mario Mercado e Hijos regarding the said estates at the time of the execution of said sale.

The plaintiff then alleges its willingness to redeem the property of the defendants who acquired as the result of the alleged conspiracy and declares itself ready to satisfy the same amount paid by the purchasers and in order to show its good faith, encloses with its complaint and makes part thereof another action to deposit money in court filed in the office of the clerk of the court which action was filed after having requested of all the defendants to convey to it the title to the properties sold.

Defendant Mrs. Elvira Olivieri Commins filed a separate answer and the other defendants filed theirs jointly.

In the said answers the defendants admitted all the allegations contained in paragraphs 1, 2, 3, 4, 5, 7, 9 and 10 of the com-

plaint, denied the remaining paragraphs and by way of special defense they pleaded as follows:

(a). That clause 7 of deed No. 13 of March 23, 1932, imposed by plaintiff upon defendant Olivieri Commins while the latter was indebted to plaintiff; that at the time the said option to purchase and lease was inserted under pressure in the said deed of mortgage, the plaintiff was not a debtor but a creditor concerning said immovables; that the plaintiff could not adjudicate to itself the estates of the defendant in case of nonperformance of the contract secured by mortgage nor could it prevent the defendant from alienating or freely disposing of such estates, and that the option clause to purchase or redeem was extinguished by the fact of the payment in full by defendant Elvira Olivieri of the aforesaid mortgage credit, the plaintiff thus forfeiting the right to redemption by its assignment of the mortgage credit to the Heirs of Jose Tous Soto, such right of redemption therefore having prescribed by reason of the lapse of more than four years from the time of its creation (Sections 1397 and 1078 of the Civil Code).

(b). That said clause 7 is moreover void because the same amounts to an agreement whereby the mortgagee is empowered to adjudicate to itself the mortgagor's property upon nonperformance of the contract secured by mortgage (Sections 2 and 4 of Act No. 47 of April 13, 1916, to repress usury).

(c). Because the same amounts to an agreement whereby the mortgagor is forbidden to alienate or freely dispose of her property. (Subdivision 4 of Article 107 of the Mortgage Law; *Van Syckel* v. *The Registrar of Property*, 3 P.R.R. 9 and *Clausells* v. *Registrar of Property*, 20 P.R.R. 298.)

(d). Because the same conflicts with Section 1412 of the Civil Code.

(e). Because it seeks to create a right that cannot be created, that is, a right of redemption to be exercised by someone who was not the vendor of the property but a mortgagee.

(f). Because, should such right of redemption be valid, the plaintiff failed to comply with the legal provisions as regard the

tender of payment, inasmuch as the tender made by it was made separately, that is, within another proceeding, that is, in civil case No. 310 of this court, instead of doing so within the above entitled case.

In the complaint, *In re:* Rescission of Lease, the same allegations are substantially made with the only alteration of the allegation made in paragraph 11 that Mrs. Elvira Olivieri, prior to March 8, 1937, in conspiracy with the other defendant Emilio Blasini Totti leased to the latter the rural estate known as Juanita, which is described.

The defendants answered the complaint separately, admitting certain facts therein alleged and denying the others, and alleging also the same defenses pleaded by the defendants in the case for rescission of sale.

After a trial in the district court of the case *In re:* Rescission of Sale, upon documentary and oral evidence, the parties made a stipulation to submit the case *In re:* Rescission of Lease on the same evidence as that as Rescission of Sale, and then filed their briefs in both cases. The court took both cases under advisement and as the outcome of the admissions made by the defendants in their answers and of the evidence introduced by both sides and considered as a whole, the court made the following findings of fact:

"By public deed No. 13 of March 23, 1932, executed before notary Fernando Zapater Martinez, defendant Elvira Olivieri Commins secured by a mortgage upon her condominiums in the estates Juanita and Indios, four promissory notes negotiable by indorsement which she executed, and at the same time she acknowledged to owe to plaintiff Mario Mercado e Hijos the sum of $41,256.89, and the latter partnership agreed to accept said promissory notes in payment of the amount owed.

"Said mortgage deed contained, among others, the following clause:

" 'Seventh: Option to Purchase and Sell and to Lease—

Notwithstanding the foregoing clause the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

"By a public deed No. 33 of May 9, 1933, executed before notary Fernando Zapater Martinez of Ponce, the partnership Mario Mercado e Hijos conveyed to the Heirs of Jose Tous Soto the said mortgage credit, by means of the proper indorsement and delivery by said partnership Mario Mercado e Hijos to the Heirs of Tous Soto of the four mortgage notes already referred to. It does not appear from this deed of conveyance of credit that the partnership Mario Mercado e Hijos reserved to itself the rights of option to sell and lease specified in clause 7 of deed No. 13 of March 23, 1932, which clause 7 is hereinbefore transcribed in this opinion. Nor does it appear either proven that such reservation of rights was made in the registry of property on the record corresponding to the conveyance of the mortgage credit.

"Obligor Elvira Commins was advised of the conveyance of the credit by means of an uncertified copy of the deed of conveyance.

"By deed No. 30 of February 25, 1937, executed before

notary Luis Lopez de Victoria, Elvira Olivieri Commins mortgaged the aforesaid estates Juanita and Indios for $45,000.00 to defendant Manuel Francisco Lluberas Passarell, of which sum the latter retained the amount of $41,000.00 to satisfy the mortgage credit constituted in favor of Mario Mercado e Hijos and conveyed to the Heirs of Jose Tous Soto.

"By deed No. 47 of March 8, 1937, executed before notary Fernando Zapater, having first obtained the proper judicial authorization, the Heirs of Jose Tous Soto cancelled the mortgage credit against Mrs. Elvira Olivieri Commins, which credit had been conveyed to said heirs by plaintiff Mario Mercado e Hijos.

"By deed No. 40 of March 9, 1937, executed before notary Luis Lopez de Victoria, defendant Elvira Olivieri Commins sold for $40,000.00 the estate Indios to the other defendant Manuel Francisco Lluberas Passarell.

"By another deed, that is, deed No. 41 of even date, March 9, 1937, and executed before the same notary Lopez de Victoria, Elvira Olivieri Commins leased to the other defendant Emilio Blasini Totti the rural estate known as Juanita.

"By deed No. 72, executed in Ponce before notary Fernando Zapater on March 31, 1937, (that is, subsequent to the cancellation of the mortgage by the Heirs of Jose Tous Soto), it was set forth by said heirs that 'the conveyance made by the partnership Mario Mercado e Hijos to said heirs did not include the right or rights set out in favor of Mario Mercado e Hijos in clause 7, *In re:* "Option to Sell and Lease" contained in mortgage deed No. 13 of March 23, 1932, (Exhibit J of plaintiff); Mario Mercado e Hijos reserving to itself the rights and obligations mentioned in said clause during the whole time of the life of the mortgage.'

"Deed No. 72, *supra*, was approved by this District Court of Ponce, according to judgment rendered on April 7, 1937,

in civil case No. 299 of this court (Exhibit E of the plaintiff).

"By deed No. 7 of April 7, 1937, executed before notary Pedro M. Porrata, Elvira Olivieri Commins was summoned to receive a certain sum of money pursuant to said clause 7 regarding option to sell and lease but Elvira Olivieri Commins refusing to accept the money. Thereupon the partnership Mario Mercado e Hijos, on April 8, 1937, deposited in the office of the clerk of this district court in case No. 310, *In re:* Deposit of Money in Court, the sum of $45,359.50, as per receipt No. 702 of the clerk (Exhibit H of plaintiff).

"The plaintiff then, on April 8, 1937, filed the complaints in cases Nos. 311 and 312, *In re:* Rescission of Sale and Rescission of Lease, respectively.

"It has also been shown that according to deed No. 73 of August 20, 1936, (while the mortgage credit conveyed to the Heirs of Jose Tous Soto was still in force), the partnership Mario Mercado e Hijos intervened in said deed No. 73, *In re:* Actual Division of Rural Estate and other particulars, which deed was executed before notary Tomas Paz Ruiz (Exhibit A of plaintiff) and gave its consent for said partition of property held in common.

"It has also been shown that neither Elvira Olivieri Commins nor any of the defendants, nor anybody else in their behalf, advised in any way to plaintiff herein Mario Mercado e Hijos, prior to the time when they were agreed upon, the lease and sale of the estates Juanita and Indios, nor at any time afterwards, Mario Mercado e Hijos becoming aware of such deals on March 10, 1937. And that the said partnership always was and is now ready to subrogate itself to the place of the purchasers and lessees of said estates for the same price and rentals and on the same terms as those of the contract of sale and lease whose rescission is hereby sought.

"It also appears to have been shown that both Elvira Olivieri Commins and all the other defendants in cases Nos.

311 and 312 were advised, prior to the execution of the contract of sale and lease, of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios.

"From the testimony of Elvira Olivieri Commins (page 81 of the Transc. of Rec.) it appears as a fact that she authorized her son-in-law Rafael Barletta to enter into negotiations with Mario Mercado e Hijos for the lease or sale of the estates Juanita and Indios.

"From the testimony of Jose R. Peralta, manager of the plaintiff partnership, (page 126 *et seq.* of the Transcript of Record) and from certain telegrams and letters mentioned in such testimony and which were admitted in evidence, it appears as a fact that from December, 1936, until May 8, 1937, Rafael Barletta and the partnership Mario Mercado e Hijos held conversations and meetings in regard to the possible purchase and lease of the said immovables from Elvira Olivieri Commins to the plaintiff partnership."

Having made the foregoing findings of fact, the court proceeded to determine the questions of law as follows:

"Counsel for both sides raised and discussed seven questions of law in their respective briefs.

"We have studied and considered them all, but in our judgment the most important of them for the determination of the present cases, are as follows:

" '1. Whether or not the plaintiff showed conspiracy and fraud on the part of the defendants for the purpose of cheating the said plaintiff of its rights in connection with said clause 7 of option to sell and lease.

" '2. Whether or not clause 7 of said deed regarding the option to sell and lease binding the said mortgagor in favor of the said partnership became extinguished by virtue of the payment of the mortgage executed by Mrs. Elvira

Olivieri Commins in favor of Mario Mercado e Hijos (Exhibit J of the plaintiff).

"'3. Whether by virtue of the conveyance from Mario Mercado e Hijos to the Heirs of Jose Tous Soto of the mortgage credit referred to in Exhibit J of the plaintiff, the rights set forth in said clause 7 of option to sell and lease were likewise conveyed.'

"For a logical consideration of the above legal questions we will invert the order of their presentation and we will begin with question No. 3.

"Article 152 of the Mortgage Law reads as follows:

"'A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry.

"'The debtor shall not be bound by said contract to any further extent than he was by his own.

"'The assignee *shall be subrogated to all the rights of the assignor.*' (Italics ours.)

"The terms stipulated in the deed of conveyance of the mortgage credit are very explicit and do not leave any room for doubt as to the intention of the contracting parties, therefore the literal sense of its stipulations shall be observed (section 1233 of the Civil Code, 1930 ed.) and there should not be understood as included in said contract things and cases different from those with regard to which the persons interested intended to contract (section 1235 of the same statute). (*Sweet* v. *Zalduondo*, 26 P.R.R. 307; *Loiza Sugar Co.* v. *Hernaiz*, 35 P.R.R. 474; section 26 of the Law of Evidence.)

"According to section 1759 of the Civil Code, the mortgage is essentially indivisible. The option to sell and lease was substantially part of said contract and, therefore, it was inseparable from the mortgage. (*Llinas* v. *Mariani*, 47 P.R.R.

543; *Montilla* v. *Van Syckel et al.*, 8 P.R.R. 153; *Puente* v. *Perez et al.*, 7 P.R.R. 181).

"Section 1418 of the Civil Code reads as follows:

" 'The sale or assignment of a credit includes that of *all the accessory rights,* such as the security, mortgage, pledge, or *privilege.*' (1930 ed.) (Italics ours.)

"In his Commentaries on the Civil Code, Vol. 10, pages 402–409, and commenting upon sections 1418 *et seq.* of said Code (1930 ed.), Manresa, among other things, expresses himself as follows:

" 'Now well: where nothing is stated, it is logical to presume, as the law presumes, *that the assignment of a principal right includes also the accessory right, which becomes a sort of supplement.*' (Italics ours.)

" 'Where we do agree is that in the case of assignment of a credit subject to a resultory condition, whose fulfillment depends upon the will of the creditor, the latter cannot, after such credit is assigned, to enforce the fulfillment of such condition. On the one hand, because in agreeing upon the assignment he was a creditor no longer. And on the other hand, because the assignment presupposes the waiver of his right which becomes incompatible with such waiver.'

"When Mario Mercado e Hijos conveyed to the Heirs of Tous Soto the said mortgage credit it made a special stipulation in regard to the interests on the credit, but it failed to make any reservation in regard to the clause of option to sell and lease. Nor was said clause mentioned by the Heirs of Tous Soto when it applied to this court for leave to become the assignee of the credit, nor either when leave was sought for the cancellation of said credit by said heirs.

"Neither deed No. 72 of May 31, 1937, executed before notary Zapater, regarding ratification of mortgage credit by the Heirs of Tous Soto (Exhibit 'F' of the plaintiff) nor

the proceedings No. 299, before this court regarding the approval of said deed, has any weight in the present cases, because said deed No. 72 was executed after the total cancellation of the mortgage credit by the Heirs of Tous Soto.

"For the foregoing reasons, we come to the conclusion that 'when Mario Mercado e Hijos conveyed to the Heirs of Tous Soto the mortgage credit, it also conveyed the rights embodied in clause 7 of option to sell and lease'.

"Question of law No. 2, after the above statements when considering question No. 3, is decided by us affirmatively, as we come to the conclusion that 'clause 7 of deed No. 13 of March 23, 1932', (Exhibit 'J' of the plaintiff) in regard to option to sell and lease become extinguished by virtue of the payment of the mortgage constituted by Elvira Olivieri Commins in favor of Mario Mercado e Hijos (section 1110 of the Civil Code, 1930 ed.).

"We will now pass upon the questions raised in No. 1, that is, 'whether or not the plaintiff showed conspiracy and fraud on the part of the defendants for the purpose of cheating the said plaintiff of its rights in connection with said clause 7 of option to sell and lease'.

"The court having reached the two conclusions previously stated when affirmatively deciding the questions of law raised in Nos. 3 and 2, it necessarily has to reach the conclusion that Mario Mercado e Hijos, when bringing these actions on April 8, 1937, had neither right to nor interest in the mortgage that had been constituted in its favor by Elvira Olivieri Commins which Mario Mercado e Hijos had conveyed to the Heirs of Jose Tous Soto.

" . . .

" 'Fraud must be proved by incontestable facts, or at least by a preponderance of evidence, for it can not be established by presumption, conjecture or suspicion.' (*Gomez* v. *Bravo et al.*, 34 P.R.R. 141; *Arruza* v. *Laugier*, 14 P.R.R. 24.)

"'Every presumption being against fraud, and something more than a mere conjecture being necessary to establish its existence, it must be shown by means of clear, strong and convincing evidence.' *Ortiz* v. *Clausells et al.*, 34 P.R.R. 509.

"'A judge should not be impressed by a charge of fraud to the extent of exalting the importance of every fact on which suspicion may be raised of its having been committed and disdaining more logical deductions compatible with good faith.' *Sabalier* v. *Iglesias et al.*, 34 P.R.R. 338.

"The court comes to the conclusion that neither conspiracy nor fraud on the part of the defendants against the plaintiffs in these cases has been shown.

"Having reached the foregoing conclusions, the court deems it unnecessary to consider the other questions of law raised and discussed in the present cases by counsel for both sides."

The judgments were registered accordingly and in both cases the plaintiff appealed therefrom to this court. Several briefs were filed and two hearings have been held in which the questions involved were discussed from every imaginable angle. In our opinion the findings of fact of the trial court still stand and its conclusions of law shall not be disturbed.

In a supplementary brief filed by the appellant, the following citation is made:

"The recording of the instrument granting the option as required by law is, of course, constructive notice of the option to a subsequent purchaser. *Chesbrough* v. *Vizard Invest. Co.*, (1913), 156 Ky. 149, 160 S.W. 725; *Kinberger* v. *Doruet* (1921), 149 La. 986, 90 So. 367; *Guerin* v. *Sunburst Oil & Gas Co.*, (1923), 68 Mont. 365, 218 Pac. 949. In case last cited the court said:

"'Since the option was an instrument entitled to be recorded, and was recorded as prescribed by law, it imparted

constructive notice of its contents to Mrs. Guerin, who was a subsequent purchaser of the property affected by the option, from the time it was filed with the county clerk of Toole county on December 9, 1921, Section 6934, above. One who purchases land from the owner after the recording of an option given by the owner to another person to purchase the same land takes with constructive notice of the option, and cannot claim to be an innocent purchaser.'"

If the plaintiff when assigning its promissory notes to the Heirs of Tous Soto had expressly reserved to itself the right of option and if when recording the assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them. The record of the original contract in the registry and that of the second contract without any reservation in regard to option, entitled the defendants to proceed as regards the plaintiff in accordance with their construction of the statute. And we have already seen that according to the statute the assignment without reservation of the mortgage notes carried with that of the option. Therefore, if the defendants resolved to assume any risk towards the plaintiff when acting in the way they did, such risk entirely disappeared when the legal precept applicable thereto was established.

The appeals must be dismissed and the judgments appealed from affirmed.

EMILIO DEL TORO,
Chief Justice.

It is a faithful copy.

I attest: JOAQUIN LOPEZ CRUZ, *Secretary Reporter.*

[Same Title.]

JUDGMENT.

San Juan, Puerto Rico, July 31, 1942.

For the reasons stated in the foregoing opinion, the judgment rendered by the District Court of Ponce on October 6, 1941, in the above entitled case is hereby affirmed.

It was so decreed, as witness the signature of the Chief Justice.

EMILIO DEL TORO,
Chief Justice.

I attest: JOAQUIN LOPEZ, *Secretary Reporter.*

It is a faithful copy

I attest: JOAQUIN LOPEZ CRUZ, *Secretary Reporter.*

On August 1, 1942, notice of this judgment and of the opinion on which it is based was served on Porrata, Tormes and Sabater by sending them copies thereof.

JOAQUIN LOPEZ,
Secretary Reporter,
Per J.C.

Received: August 11, 1942, 10:52 A.M., Supreme Court of Puerto Rico.

[Same title.]

MOTION TO RECONSIDER JUDGMENTS.

To the Honorable Court:

Now come the defendants Lluberas Pasarell and Emilio Blasini Totti through their undersigned counsel and pray this court to reconsider its judgments rendered on July 31, 1942, in the sense of imposing the costs and a substantial amount as fees for counsel for these defendants and appellees and in support thereof they state as follows:

1. That in rendering its judgments in the present case the District Court of Ponce correctly applied the law to the facts in the

present cases, it being expressly held by the District Court of Ponce that plaintiff was not sufficiently interested in order to be entitled to bring the present suits because it had entirely disposed of any right to or interest in said notes and the mortgage securing the same, which contained the clause of option to sell and lease (Exhibit 3 of defendant Olivieri, Transcript documentary evidence, pp. 412–425), which it had assigned to the Heirs of Jose Tous Soto, ever since May 9, 1933, (Exhibit F of plaintiff, Transcript documentary evidence, pp. 286–302).

2. That in rendering its judgments in the present cases, the District Court of Ponce found plaintiff Mario Mercado e Hijos to be obstinate and imposed against it the costs, expenses, disbursements, in the sum of two thousand dollars ($2,000) as attorney's fees in case No. 8501, *In Re:* Rescission of Sale, and four hundred dollars ($400) as attorney's fees in case No. 8502, *In Re:* Rescission of Lease.

3. That in affirming the judgments in the present cases this Honorable Court agreed with the theory set forth by the District Court of Ponce in its opinion and statement of the case which were made part of the judgments rendered therein.

4. That from whatever angle the legal situation may be viewed, plaintiff Mario Mercado e Hijos was not entitled to prosecute these suits, and its appeals from the judgments rendered by the District Court of Ponce in these cases turned out to be frivolous, and for that reason it was proper to tax against it the costs on appeal and a substantial amount as fees for the undersigned attorneys of defendants and appellees, who have had to work hard to clear up a situation sought to be confused in its brief by plaintiff and appellant which appears to be an obstinate litigant and against which the law should be rigorously applied.

For the above reasons we pray this Honorable Court to modify its judgments in the present cases so as to include therein the costs on appeal and a substantial amount as attorney's fees to be taxed against the plaintiff and appellant.

In Ponce to be filed in San Juan, Puerto Rico, on August 10, 1942.

LUIS LOPEZ DE VICTORIA *and*
LEOPOLDO TORMES,
Counsel for Defendants and Appellees
LLUBERAS PASARELL *and* EMILIO BLASINI TOTTI,
Per LEOPOLDO TORMES,
One of the Attorneys.

IN THE SUPREME COURT OF PUERTO RICO.

Civ. 8501.

Mario Mercado e Hijos, Plaintiff-Appellant,

v.

Elvira Olivieri Commins, Manuel Francisco Lluberas Pasarell and his wife Hazell Kelly Lluberas Pasarell, Antonia Lluberas Pasarell, Rosa Elena Lluberas Pasarell, Graciela Lluberas Pasarell and her husband Antonio Valentin Maestre, Celia Lluberas Pasarell and her husband Emilio Blasini Totti, Raquel Lluberas Pasarell, Defendants-Appellees.

In re: Rescission of Sale and other Particulars.

Appeal from the District Court of Ponce.

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

[Received August 17, 1942, 3:15 P.M.]

Notice is hereby given that Mario Mercado e Hijos, plaintiff and appellant herein, appeals hereby to the United States Circuit Court of Appeals for the First Circuit from the final judgment rendered and entered by the Supreme Court of Puerto Rico in the above entitled case on July 31, 1942, whereby the judgment rendered in this suit by the District Court of Ponce, Puerto Rico, was affirmed.

The appellees to the appeal herein taken are those specified in the caption hereof.

Bond for costs in the appeal now prosecuted is filed with this notice.

San Juan, Puerto Rico, August 17, 1942.

PEDRO M. PORRATA,
Ponce, Puerto Rico,
by ISMAEL SOLDEVILA,
San Juan, P. R.,
Attorneys for Appellant.

[MEMORANDUM: Costs bond in the sum of $250, Glen Falls Indemnity Company, surety, filed August 17, 1942; petition for fixing the amount of supersedeas bond, filed August 17, 1942; order fixing the amount of supersedeas bond at $1000, entered August 24, 1942; and supersedeas bond in the sum of $1000, Great American Indemnity Company, surety, filed August 26, 1942, are here omitted. A. I. CHARRON, *Clerk*.]

Received October 1, 1942, 11:07 A.M. Supreme Court of Puerto Rico.

[Same title.]

DESIGNATION OF RECORD ON APPEAL TO UNITED STATES CIRCUIT COURT.

Now comes Mario Mercado e Hijos, appellant herein, by its undersigned attorneys Pedro M. Porrata and Ismael Soldevila, and hereby gives notice of the following:

That the appellant herein took its appeal on August 17, 1942, from judgment rendered and entered in this case by the Supreme Court of Puerto Rico on July 31, 1942, to the United States Circuit Court of Appeals for the First Circuit.

That said appellant promptly instructed the clerk or secretary reporter of the Supreme Court of Puerto Rico, and hereby again

does instruct him, as to the contents of the record on said appeal taken to the United States Circuit Court of Appeals for the First Circuit.

That the aforementioned record on appeal shall contain the complete record of the case and all the proceedings and evidence taken in the action.

San Juan, Puerto Rico, September 30, 1942.

PEDRO M. PORRATA *and*
ISMAEL SOLDEVILA,
by ISMAEL SOLDEVILA,
Attorneys for the Appellant.

CERTIFICATE OF MAILING OF COPIES.

Ismael Soldevila, attorney for the appellant, Mario Mercado e Hijos, hereby certifies:

That on October 1, 1942, he has sent by mail a copy of the foregoing to each one of the attorneys for the appellees herein, that is, to Luis Lopez de Victoria, Leopoldo Tormes, Jose S. Sabater and Jose Oliver Sabater, Esquires, to their respective known addresses at Yauco, Ponce and Mayaguez, Puerto Rico; that each one of those copies was enclosed in a sealed envelope with sufficient postage and clear address and each one of said envelopes having been deposited or placed in the mails at the post office in the city of San Juan, Puerto Rico; that between this city and each one of the cities of Yauco, Ponce and Mayaguez, there is a regular daily communication by mail, maintained by the United States Post Office Department.

San Juan, Puerto Rico, October 1, 1942.

ISMAEL SOLDEVILA,
Attorney for Appellant.

[Same title.]

ORDER.

[By the Court, on motion of Mr. Chief Justice del Toro.]

San Juan, Puerto Rico, November 3, 1942.

The motion for reconsideration of the judgments rendered in the above entitled cases filed by the defendants Lluberas and Blasini to the effect that the plaintiff should be adjudged to pay the costs on appeal and a substantial amount for the payment of attorney's fees on the ground that the appeals are frivolous, is hereby denied.

It was so ordered by the court as witness the signature of the Chief Justice.

EMILIO DEL TORO,
Chief Justice.

I attest: JOAQUIN LOPEZ, *Secretary Reporter.*

It is a faithful copy.

I attest: JOAQUIN LOPEZ CRUZ, *Secretary Reporter.*

Received November 2, 1942. 9:22 A.M. Supreme Court of Puerto Rico.

Office of the Clerk

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

Arthur I. Charron Clerk

1602 P. O. & U. S. Courthouse Boston, Massachusetts.

October 29, 1942.

Your Nos. 8501 and 8502,

Matio Mercado e Hijos *v.* Elvira Olivieri Commins et al.

Secretary-Reporter of the Supreme Court of Puerto Rico, San Juan, Puerto Rico.

Dear Sir:

Upon motion of appellant in the two above-entitled cases, this

court today entered orders of enlargement of time within which to file the transcripts of record and docket these cases to, and including, December 31, 1942.

Respectfully,

ARTHUR I. CHARRON,
Clerk.

[MEMORANDUM: Orders of enlargement of time for docketing case to April 1, 1943, are here omitted. A. I. CHARRON, *Clerk.*]

IN THE SUPREME COURT OF PUERTO RICO.

8501.

Mario Mercado e Hijos, Plaintiff and Appellant,

v.

Elvira Olivieri Commins et al., Defendants and Appellees.

Rescission of Lease and other particulars.

Appeal from the District Court of Ponce.

CERTIFICATE OF TRANSLATION.

I, Luis Jordan, translator of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful translation of the record, on appeal to the United States Circuit Court of Appeals for the First Circuit, in the case of Mario Mercado e Hijos, plaintiff and appellant, *v.* Elvira Olivieri Commins et al., defendants and appellees, Civil No. 8501.

San Juan, Puerto Rico, this twenty-fourth day of December, 1942.

LUIS JORDAN,
Translator of the Supreme Court of Puerto Rico.

[Same Title.]

CLERK'S CERTIFICATE.

I, Joaquin Lopez, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing papers and proceedings had in the above-entitled case are true and faithful copies of their respective originals as the same appear on file and of record in this office;

I further certify that the translation of said papers and proceedings has been revised by the translator of this court, as shown by his certificate attached and made a part of this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of this court, in the city of San Juan, Puerto Rico, this eighteenth day of February, 1943.

JOAQUIN LOPEZ.

[$204.28 internal revenue stamps cancelled.]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS.

STATEMENT OF POINTS.

[Filed in Circuit Court of Appeals March 26, 1943.]

Now comes plaintiff-appellant, partnership Mario Mercado e Hijos, a partnership duly organized by and under the laws of Puerto Rico, and files the following assignment of error or "points on appeal" upon which it relies in the prosecution of the appeal herewith petitioned for in this case, from the judgment of the Supreme Court of Puerto Rico entered on the thirty-first day of July, 1942.

1. The Supreme Court of Puerto Rico erred in affirming the judgment of the District Court for the Judicial District of Ponce, Puerto Rico, rendered October 6, 1941.

2. The Supreme Court of Puerto Rico committed a plain error of law in not declaring that the proceedings in ex-parte, Civil No. 299 over ratification of covenant, in which Sucesion Tous Soto solemnly recognizes that the option belongs to Sociedad "Mario Mercado e Hijos" and not to the Sucesion, are sufficient,

according to the doctrine of *Gisselman* v. *Starr,* 106 Cal. 651, 657, 40 P 8, *Blaser* v. *Fleck,* 96 Or. 187, 190, 189 P 637, *Seybold* v. *Grand Folks Nat. Bank,* 5 N.D. 460, 467, 67 NW 682, *White* v. *The Mary Ann,* 6 Cal. 462, 65 AmD 523, *Sturgis* v. *Baker,* 43 Or. 236, 241, 72 P. 744; *Greene* v. *McAuley,* 70 Kan. 601, 607, 79 P 133, 68 LRA 308; *Elmquist* v. *Markoe,* 45 Minn. 305, 307, 47 NW 970, to convert partnership Mario Mercado e Hijos into the real party in interest, according to the facts of the case and the interpretation placed upon Section 51 of our Code of Civil Procedure by the courts of those states, in United States, where that civil code was originated; this section having received no interpretation yet from this angle in Puerto Rico.

3. The Supreme Court of Puerto Rico committed a plain error of law in holding, after making the following findings of facts in the ejectment case and in the instant case:

Lluberas v. *Mercado,* 55 D.P.R. 46.

> We do not wish to reach any conclusions in this case which might affect the decision of the questions on their merits, but we do state that the evidence of the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, *supra;* that they knew that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option. . . .

Mario Mercado e Hijos v. *Elvira Olivieri et als.* (Record 836, 849–850.)

> "It also appears to have been shown that both Elvira Olivieri Commins and all the other defendants in cases Nos. 311 and 312 were advised, prior to the execution of the contract of sale and lease, of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios.

That plaintiff-appellant had not a cause of action against defendants-appellees and that defendants-appellees could escape with the fruits of the conduct represented by the above inserted findings.

4. The Supreme Court of Puerto Rico committed evident error of law in holding that the notice to defendants of plaintiff's rights to the option arising from the information furnished to defendants by the predecessors in title and co-defendant, dona Elvira Olivieri Commins, and admitted by defendant Manuel Fco. Lluberas Pasarell, was not sufficient in law to put defendant on guard and did not oblige him to act in good faith toward plaintiff-appellant, Mario Mercado e Hijos.

5. The Supreme Court of Puerto Rico committed a plain error of law in deciding that the execution of a mortgage, upon property which is subject to an option of sale in favor of a third person, on February 25, 1937 for the sum of $40,000, the keeping of the money by the mortgagee, who is a relative of the optioner owner of the property, the paying of a previous mortgage, upon which the subsistence of the option depended, with the money of the second mortgage on March 8, 1937 and the sale of the property the next day to the supposed mortgagee for the same price for which it was mortgaged only 13 days before, was not sufficient evidence of concerted action to violate the option so as to throw the burden of proof upon defendants, which burden was not maintained in this action.

6. The Supreme Court of Puerto Rico committed a plain error of law in not giving to the evidence adduced by plaintiff in the instant case its full weight and implications and in not declaring that the bad faith of the defendants established beyond doubt according to the equitable and legal principles applicable as well as in not obliging defendants-appellees by the agreement legitimately entered into in March 23, 1932; agreement which is not contrary to law.

7. The Supreme Court of Puerto Rico committed plain error of law in not adopting the interpretation placed by the parties

themselves through their own conduct upon the covenant of March 23, 1932, to the effect that the personal privileges granted to Mario Mercado e Hijos in the said covenant did not follow the mortgage notes in the hands of the holder in due course.

8. The Supreme Court of Puerto Rico committed plain error in not following its decision in the case *Lluberas* v. *Mercado*, 55 D.P.R. 46, and the clear implications of the finding of facts made in said case under evidence equal to the evidence adduced in the instant case and covering the same properties and parties.

Wherefore, plaintiff-appellant prays that the judgment rendered in this case by the Supreme Court of Puerto Rico be reversed and for such other and further relief as may seem just and proper.

Ponce, Puerto Rico, March 23, 1943.

Respectfully submitted,

PEDRO M. PORRATA,
Attorney for Plaintiff-Appellant.

Copy of the foregoing statement of errors or "points on appeal" received this twenty-third day of August, 1943.

LEOPOLDO TORMES GARCIA,
Attorney for Defendants-Appellees
LLUBERAS PASARELL,
by PEDRO JULIO PEREZ, *Clerk.*

STATEMENT ON APPEAL.

[Filed in Circuit Court of Appeals March 26, 1943.]

Honorable Court:

This appeal is being prosecuted under Title 28, Section 225, U.S.C.A., paragraph 4, providing for the review of decisions of the Supreme Court of Puerto Rico in cases involving amount in excess of $5,000.

The amount in controversy giving jurisdiction to this court appears from the complaint (R. pp. 2–12, specially at pages 5-6, 2–12, wherein it appears that plaintiff-appellant deposited with

the Secretary of the District Court of Ponce, in which court the case originated, the sum of $40,000. The allegation of the complaint in relation to this deposit was admitted in the answer (R. p. 26). An affidavit [Exhibit A] is in anyway included to show the presence of such jurisdictional amount.

The Facts and the Law of this Case Point to the Presence in the Proceedings of an Obvious Error of Law Requiring a Review on the Merits by This Court.

The case presented by this appeal is equally forciful and convincing whether approached from the substantive or adjective point of view. Let us formulate in two concise statements, with general and specific application, the substantive and procedural propositions that plaintiff-appellant intend to establish.

Substantive Proposition.

1. Plaintiff-appellant sustains that in this case an option obtained on good consideration (Complaint, R. pp. 6–7 [printed page 4], admitted by defendants in the answer R. p. 26) was deliberately avoided through a connivance, with full knowledge of the facts; (see *Lluberas* v. *Mercado*, 55 D.P.R. 39 at page 43, wherein the Supreme Court of Puerto Rico in deciding the ejectment case referred to in the opinion of the court below between the same parties and under the same facts (see R. pp. 474–75) stated that defendants in this case, who were plaintiff and losers in that case, knew that plaintiff-appellant, who was defendant and winner in that case, was trying to enforce the option right before the cancellation of the mortgage and that it was never given a chance to make use of its option) between optioner and buyers, all of them defendants-appellees in this case, who did, in order to avoid the option, precisely what the terms of the option contract specifically forbidded.

In other words: as defendants-appellees knew that plaintiff-appellant had an option to buy or lease the estates "Indios" and

"Juanita" while certain mortgage notes remain unpaid (please see, in addition to the conclusion of the Supreme Court of Puerto Rico in *Lluberas* v. *Mercado, supra,* the testimony of defendant Manuel Francisco Lluberas Pasarell, R. pp. 104–126, who acted as agent for all defendants, wherein he admits that he knew that plaintiff-appellant was the holder of the option), defendants-appellees could not legally avoid the acquired rights of plaintiff-appellant under the option contract by the rather naive trick of executing what pretends to be a mortgage in favor of the intended buyers in February 25, 1937 (R. pp. 303–311), on the estate known as "Indios" for the sum of $40,000, paying the outstanding mortgage notes with the money of the simulated mortgage on March 8, 1937, using the mortgagee, who retained the money, as agent, and then selling the mortgaged estate to the same mortgagee for exactly the amount for which the property was apparently mortgaged a few days before. (Please see, in addition to the mortgage deed of February 25, 1937, R. pp. 303–311, cancellation deed March 8, 1937, R. pp. 312–321 and sale deed of March 9, 1937, R. pp. 443–453; the almost simultaneous execution of all of which, one defendant acting as seller and the others as buyers, considered in relation to the altogether awkward terms of the mortgage deed of February 25, 1937, shows a clear cut case of conspiracy that should be treated as the Supreme Court of Puerto Rico treated it in the ejectment case and not as that court treated it in the decision now appealed from.)

PROCEDURAL PROPOSITION.

Plaintiff-appellant sustains that under section 51 of our Code of Civil Procedure, which was brought into the Island from the United States, when a defendant alleges that he is not indebted to plaintiff but to a third person (R. pp. 26–28), if the third person, to whom defendant accepts to be obliged, appears in the case and declares that defendant is not indebted to him but to plaintiff (R. pp. 281–303), defendant, then, is not entitled to prevail unless he can show some equity against the third person

which he cannot raise against plaintiff; the concern of defendant in any action being at an end when it appears from the record that a judgment under the circumstances would be a complete bar to any further harassing under the same facts. (*Giselman* v. *Starr*, 106 Cal. 653.)

In other words: The defense interpose by defendants-appellees that the heirs of Jose Tous Soto were the owners of the option (which is allege [*sic*] they violated) and not plaintiff-appellant, was more than sufficiently met and answered by the heirs appearance in court in Civil Case No. 299 of the District Court of Ponce, which is part of the evidence of this case, and declaring therein that the option belonged to plaintiff-appellant; for defendants-appellees never showed that they tried to comply with Tous Soto's heirs and they, defendants-appellees, certainly could not be regarded as liable to be sue [*sic*] by such heirs, who had solemnly appeared and admitted that plaintiff-appellant and not themselves was the holder of the option. (*Giselman* v. *Starr*, *supra*.)

Either the Substantive or the Procedural Point of View is Sufficiently Clear in Favor of Plaintiff-Appellant.

Under any of the two points of view indicated above, the decision of the Supreme Court of Puerto Rico is obviously erroneous. Moreover: considering the finding of facts made in the ejectment case (please see *Lluberas* v. *Mercado*, *supra*), the Supreme Court of Puerto Rico presents a rare case of a sort of house divided against itself. This case should, therefore, be reviewed by this tribunal in the interest of justice and fairness in human dealings. The rule is fairly well established that the wrongdoer whether cicil [*sic*] or otherwise is not to be allowed to escape with the fruits of its own wrong. (See *In re Morris*, 156 Fed. 597, 600.)

The Option Was Obviously a Personal Privilege of Plaintiff-Appellant.

Let us consider more specifically points in favor of our theory that the decision of the court below is patentedly erroneous.

The deed of March 23, 1932 contains two obviously separable contracts: (1) The first between mortgage notes debtor, dona Elvira Olivieri Commins and the holder in due course by endorsement of the mortgage notes and (2) the second between dona Elvira Olivieri Commins as owner of the estate "Indios" and partnership Mario Mercado e Hijos, plaintiff-appellant, as acceptor of the mortgage notes in payment of his debt due and collectible. The option was given in exchange for this acceptance. (Please see complaint, allegations 1 to 7, R. pp. 1–7 [printed pages 2–5], admitted in the answer, R. pp. 21–22, and showing that the acceptance is payment of the debt due and collectible of the mortgage notes was a completely separated transaction from the execution of the negotiable mortgage notes themselves.) The option contract was made specifically in favor of Mario Mercado e Hijos and not of the holder in due course of the negotiable mortgage notes. It reads as follows. (Complaint, R. pp. 6–7 [printed pages 4, 5].)

> "SEVENTH. Option to Buy and Lease: Not withstanding the terms of the previous clause the debtor, as a part of the consideration of this contract, agrees with the partnership "Mario Mercado e Hijos" to give them preference for the sale or lease of her tenancy in common in the farms "Indios and Juanita" on equal terms and price. For this purpose the debtor will communicate during the time that the mortgage credit has not been paid, by certified letter to "Mario Mercado e Hijos" any offer to sell or lease which may be made to her, and said partnership shall have a term of thirty days to accept or refuse the proposition, and during said term the debtor shall not make a sale or lease to any other person. In case a sale or lease is made in violation of this contract "Mario Mercado e Hijos" shall have the right of redemption against the purchaser or lessee which right it may exercise within 30 days after the recording of the sale or lease to subrogate itself in the place of the purchaser or lessee."

Obviously, the option to buy and lease was personal to plaintiff appellant and did not follow the negotiable notes into the hands of the holder in due course. That such is the case is shown, not only by applicable and wellknown principles of law, but by the interpretation of the parties made in the partition deed of August 20, 1936 (R. pp. 225–259) wherein plaintiff-appellant appeared as party to give her consent to said partition more than 3 years after transferring the mortgage notes to the heirs of Jose Tous Soto. This appearance was made under clause 11 of the deed of March 13, 1932 (R. pp. 322–328 at p. 328) which was another personal privilege of plaintiff-appellant. Clause 11 reads as follows (Complaint, R. p. 7 [printed page 5]):

> ELEVENTH: The parties likewise agree that the material division of said farms shall not be made without the consent of "Maria Mercado e Hijos" while the mortgage hereby created is in effect.

THE REGISTRY OF PROPERTY INFORMED EVERYBODY THAT THE PERSONAL PRIVILEGES OF PLAINTIFF-APPELLANT DID NOT FOLLOW THE MORTGAGE NOTES INTO THE HANDS OF THE TRANSFEREE.

Partition deed of August 20, 1936 was recorded in the Registry of Property (R. pp. 258–9) and as dona Elvira, the optioner, derived her title from said partition deed, it must be regarded as unquestionable that the other defendants, buyers from Dona Elvira, are imputable with knowledge of the facts revealed by that deed. (See *Ochoa* v. *Hernandez y Morales*, 230 U.S. 139–164, and *Comunidad Religiosa, etc.*, v. *Fernandez*, 61 D.P.R. 133, at page 142 spanish edition.) This legal proposition which is enough by itself, is supported as a matter of fact by the admissions of Francisco Lluberas Passarell (R. pp. 104–126), by the conclusions of facts of the Supreme Court of Puerto Rico in the ejectment case, which should be taken as conclusive jurisprudence being under the same facts, and by the binding and conclusive admission of dona Elvira, one of the defendants-appellees, to the effect that

there was a secret understanding among defendants-appellees to beat plaintiff-appellant out of their's option. (Please see R. pp. 381–384.)

THE SUPREME COURT OF PUERTO RICO MADE IN THE EJECTMENT CASE A CONCLUSIVE FINDING OF FACTS.

Let us reproduce right here the conclusion of facts in the ejectment case of the Supreme Court of Puerto Rico pertinent to the point at issue.

Lluberas v. *Mercado*, 55 D.P.R. 43:

> We do not wish to reach any conclusion in this case which might affect the decision of the questions on their merits, but we do state that the evidence of the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, *supra;* that they knew that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option.

Under the circumstances indicated above, the theory of plaintiff-appellant that, the mortgaging of "Indios" for the sum of $40,000 for only 6 months on February 25, 1937, Dona Elvira Oliviera acting as mortgagor and the other defendants as mortgagees, the retaining of the money by the mortgagee, the paying of the mortgage notes on March 8, 1937, and the selling of the property the next day, March 9, 1937, to the very same mortgagees for the very same amount of the mortgage, was nothing but the product of a connivance to beat plaintiff-appellant out of its option, must be understood as established beyond question. The Supreme Court of Puerto Rico must be regarded, therefore, as having committed obvious error in departing from the obligatory legal consequences deriving from it significant finding made in the ejectment case that defendants-appellees knew of the option and

did everything to prevent plaintiff-appellant from exercising their right.

It is true that the decision on the question of ejectment left certain legal questions for further consideration. But it did not leave open the question of "Scienter" of knowledge on the part of defendants-appellees which is also found as a matter of fact by the court in the decision appealed from. (See opinion, R. pp. 481–482.)

> It also appears to have been shown that both Elvira Olivieri Commins and all the other defendants in cases Nos. 311 and 312 were advised, prior to the execution of the contract of sale and lease, of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estate Juanita and Indios.

Defendants-appellees knew that the option was the property of Mario Mercado e Hijos. Francisco Lluberas Passarell, agent of all defendants, admitted he knew it (R. pp. 104–126). The Supreme Court of Puerto Rico, in the ejectment case, and in the present one says defendants-appellees knew it and acted deliberately. (*Lluberas* v. *Mercado,* 55 D.P.R. 39–43.) The Registry of Property informed defendants-appellees that the personal privileges granted plaintiff-appellant in deed of March 13, 1932 in exchange for accepting payment in negotiable notes of a liquidated debt, remain with plaintiff-appellant. (See *Ochoa case, supra.*) What else is necessary to oblige defendants by their knowledge and how can they escape the consequences following to him who acted with "scienter"?

Defendants' Plea Accepts Responsibility and Tries to Avoid Consequences.

Let us see now the procedural angle.

When plaintiff-appellant sued defendants-appellees, defendants-appellees pleaded that the option went with the notes into the hands of the heirs of Jose Tous Soto. (Answer, R. pp. 26–

29.) The heirs of Jose Tous Soto are in the record of this case. They solemnly say in that appearance (R. pp. 286–302 at p. 288) that the option belongs to the plaintiff-appellant and not to them, the heirs of Jose Tous Soto. Defendants-appellees did not allege or proved that they tried to fulfill the option to heirs of Jose Tous Soto. (See answer, R. pp. 26–31.) That is, they implicitly admit by their plea that they deliberately violated the option, and try to avoid responsibility by arguing that plaintiff-appellant is not the real party in interest and is, thereby, not entitled to sue them. But such position cannot be assumed by a defendant under our Code of Civil Procedure, which is of United States origin and, which, on the point at issue, has not yet been interpreted in Puerto Rico while it has been thoroughly interpreted in the States.

This is not an action tending to declare rights between Mario Mercado e Hijos, plaintiff-appellant, and Tous Soto's heirs, one acting as plaintiff and the others as defendants. Such an action is impossible under the circumstances, for it appears from the record that the Heirs have admitted that they never obtained the option.

Pertinent Provision of the Code of Civil Procedure and Judicial Interpretation of Similar Cases.

As defendants-appellees allege that plaintiff-appellant should not require compliance with the option clause, that it should be the heirs of Jose Tous Soto, the question is, therefore, reduced to the procedural problem of determining whether plaintiff-appellant complies with the requirements of party really interested within article 51 of our Code of Civil Procedure, which reads as follows:

Art. 51, Code of Civil Procedure:

> Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this Code. Appearance in court shall be made through an attorney legally empowered to exercise his profession under the provisions of this law.

To save the court time, the one indicated below is the criteria of jurisprudence in cases arising under the precise facts of our case:

"The purpose of the statute is readily discernible, and the right (of defendant to have a cause of action against him prosecuted by the real party in interest) is limited to its purpose." *Giselman* v. *Starr*, 106 Cal. 651, 657, 40 P 8 (per Henshaw, J.).

"The statute requiring that every action shall be prosecuted in the name of the real party in interest (Section 27, L. C. L.) was enacted for the benefit of a party defendant, to protect him from being again harassed for the same cause. But if not cut off from any just offset or counterclaim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end." *Blaser* v. *Fleck*, 96 Or. 187, 190, 189, P 637.

"All that the debtor is interested in is protection against a second action on the same claim." *Seybold* v. *Grand Forks Nat. Bank*, 5 N.D. 460, 467, 67 NW 682.

"It is beyond question that a recovery will bar another action for the same cause, and whenever a defendant is thus protected, he has no right to make the objection which is here set up" that the action is not brought by the real party in interest. *White* v. *The Mary Ann*, 6 Cal. 462, 65 AmD 523.

"The statute requiring that every action shall be prosecuted in the name of the real party in interest was enacted for the benefit of a party defendant to protect him from being harassed for the same cause, but if not cut off from any just offset or counterclaim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. This is the test as to whether such a defense is properly interposed." *Sturgis* v. *Baker*, 43 Or. 236, 241, 72 P 744.

"This suggests what we conceive to be the true rule, of

general, if not universal application, that so far as affects the question of the right of the plaintiff to maintain the action the only inquiry open to the defendant is whether the plaintiff has such title to the note that a payment made to him would be a complete protection to defendant from any further liability." *Greene* v. *McAuley*, 70 Kan. 601, 607, 79 P 133, 68 LRA 308.

"A recovery by plaintiff will fully protect the defendants, and they have no interest in the equities between him and his assignor, unless an inquiry into the subject had become material upon the right of interposing some defense or counterclaim against the assignor." *Elmquist* v. *Markoe*, 45 Minn. 305, 307, 47 NW 970.

In *Giselman* v. *Starr*, 106 Cal. 653, the facts were the following:

Starr executed the note and mortgage in suit to William Giselman, trustee, in payment and cancellation of an existing note, also secured by mortgage, made by him to S. C. Hastings. A few days thereafter Giselman indorsed the note, "Pay to the order of S. C. Hastings, without recourse, William Giselman, trustee", and delivered it to Hastings. At the same time he executed, as trustee, an assignment to Hastings, coming into the hands of the executors, of whom Giselman is one, this action was in due time commenced.

The defendant meets it by answer and cross-complaint, whereby he claims that he executed the note and mortgage to Giselman, as trustee for the use and benefit of the daughters of said Hastings; that at the time of the assignment to Hastings he knew this fact, and, so knowing, took the note and mortgage without consideration; that thereafter Ella Hastings, daughter of S. C. Hastings, acquired by gift all of the interest of S. C. Hastings in the note and mortgage, and that the action is not prosecuted by the real parties in interest.

The named beneficiaries of the trust and the widow of S. C.

Hastings are interpleaded as having or claiming some interest in the mortgage and note, and are brought in under averments that without a determination of their rights defendant cannot tell to whom to pay the amount found due, nor with safety redeem in the event of a sale.

Plaintiff's answer to the cross-complaint does not, in terms, deny that the note and mortgage were executed to Giselman as trustee for the use and benefit of the named children of S. C. Hastings, but does deny that they are or ever have been the property of the children or any of them. Upon all other material averments of the cross-complaint it joins issue.

The children and others interpleaded by defendant, one and all filed "disclaimers"; and in this state of the pleadings the trial was had.

The death of Hastings and their appointment as executors admitted, plaintiffs introduced the note with its endorsement, the mortgage and the assignment of it, and rested upon this direct evidence and the presumption arising from it.

The court, after examining the facts of the case expressed itself thus:

The defendant has a statutory right to have a cause of action against him prosecuted by the real person in interest (Code Civ. Proc., sec. 307), and it was in the exercise of that right that he pleaded lack of title in plaintiffs and asked to have determined the conflicting claims of those whom he asserted to be the owners. But the purpose of the statute is readily discernible, and the right is limited to its purpose. It is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand. It is to prevent a claimant from making a simulated transfer, and thus defeating any just counterclaim or set off which defendant would have to the demand if pressed by the real owner. But where the

plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or lose, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest. The cases which seemingly lay down the broad rule that it is not a good plea to allege that the note sued upon is the property of another and not of plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, are to be read in the light of their facts, and so read they will be found to be in strict accord with what is here said. These are cases where prima facie legal title is shown in plaintiff, such a title as would protect defendant if judgment were obtained upon it. If, under such circumstances, the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defense against the real owner which he can not maintain against the prima facie legal owner. Such is the meaning of *Price* v. *Dunlop*, 5 Cal. 483, and *Gushee* v. *Leavitt*, 5 Cal. 160, 63 Am. Dec. 116.

In *Giselman* v. *Starr*, *supra*, which is strikingly similar to ours, the person whom defendant pretended was the real party in interest appeared in the record disclaiming. The same in our case. That is why the cases cited above should be considered in their full import. They really reveal that in a triangle fight of this kind, the procedural test should be strictly applied in the interest of justice.

SUMMARY OF THE PROCEDURAL PROBLEM.

Let us summarize thus: The person with the right to file suit, which is known as the real party in interest, is not determined, in cases of this nature, by trying to settle a non-existing controversy between the supposed real party and the actual plaintiff. It is

determined by measuring the possible consequences of an adjudication upon the rights of defendant. Thus jurisprudence has already decided that, in cases of this nature, the interest of defendant is limited to being protected against being harassed for the same cause by another plaintiff. There his concern is at an end if he cannot show an equity against the third person which he cannot raised against the actual suitor. In this case, not such equity appears. On the contrary, the case clearly points out to the use of a defense with the sole purpose of escaping with the fruits of a connivance; a thing certainly not contemplated by the section of the statute above referred to.

GENERAL SUMMARY.

In this statement on appeal we have being able to demonstrate:

1. That under the same facts in an ejectment case between the same parties, the Supreme Court of Puerto Rico found "scienter" in the conduct of defendants-appellees.

2. That the record also discloses that the Supreme Court of Puerto Rico in the decision appealed from, found "scienter" on the part of defendants-appellees, but failed to give to such finding the natural and logical consequences that the law attaches to "scienter" everywhere.

United States v. *Amistad*, 10 L. Ed. 826:

> Fraud will vitiate any, even the most solemn transactions and any asserted title to property, founded upon it, is utterly void.

United States v. *Thorckmorton*, 25 L. Ed. 93:

> Fraud vitiates the most solemn contracts, documents and even judgments.

The Dos Hermanos, Green, Claimant, 4 L. Ed. 189, 193:

> It is a settled rule of this court, that if a party will attempt to impose upon the court by knowingly or fraudulently claiming as his own property belonging in part to others, he shall not be entitled to a restitution of that portion which he may ulti-

mately establish as his own. This rule is founded in the purest principles of moraliry and justice, and would bear upon the claim of Mr. Green, supposing his domicile, as a neutral, were ever so clearly established.

3. That the record shows that the conclusions of the Supreme Court of Puerto Rico in the ejectment case were sound and valid.

4. That the execution of a mortgage in February 25, 1937 on the property subject to the option, the paying of the mortgage notes with the mortgage money on March 8, 1937, and the selling of the estate to the very same mortgagees for the very same amount of the mortgage the day after, shows a clear cut act of connivance, which now defendants-appellees are trying to avoid by alleging that the option belonged to a third person and not to plaintiff-appellant.

5. That this allegation that the option belonged to the heirs of Jose Tous Soto and not to plaintiff-appellant, was sufficiently answered by the heirs' appearance in the record and stating that it did not, even if the other facts appearing from the record would not clearly show that defendants-appellees knew that plaintiff-appellant was the real owner of the option.

Exhibits.

A copy of plaintiff-appellant's complaint is included as forming part of this statement on appeal to show the facts and the theory of plaintiff-appellant case.

Conclusion.

That this appeal should be allowed and the case be heard on the merits.

Ponce, Puerto Rico, March 23, 1943.

Respectfully submitted,

PEDRO M. PORRATA,

Attorney for Plaintiff-Appellant.

Copy of the foregoing statement on appeal received this twenty-third day of August, 1943.

LEOPOLDO TORMES GARCIA,
Attorney for Defendants-Appellees
LLUBERAS PASSARELL,
by PEDRO JULIO PEREZ, *Clerk.*

EXHIBIT A.

[Title omitted.]

AFFIDAVIT.

Now comes MARIO MERCADO RIERA as managing partner of Mario Mercado e Hijos and under oath does solemnly swear and establishes:

That in the instant case Partnership Mario Mercado e Hijos deposited with the Secretary of the District Court of Ponce the sum of forty thousand dollars ($40,000).

That the amount in controversy exclusive of interest and costs in this case is by far in excess of five thousand dollars ($5,000) as represented by what the property in controversy is valued and what it means for the firm Mario Mercado e Hijos to acquire the estate.

Ponce, Puerto Rico, this twenty-third day of March, 1943.

MARIO MERCADO RIERA,
Managing Partner of Mario Mercado e Hijos.

Affidavit No. 1094.

Sworn and subscribed before me by Mr. Mario Mercado Riera as managing partner of Mario Mercado e Hijos, of age, married and resident of Ponce, Puerto Rico, to me personally known this twenty-third day of March, 1943 at Ponce, Puerto Rico.

J. C. Santiago Matos,
[SEAL] Notary Public.

25 cent Internal Revenue stamp cancelled.

EXHIBIT B.

COMPLAINT.

[MEMORANDUM: The complaint already printed at page 2 is here omitted: A. I. CHARRON, Clerk.]

MOTION TO DOCKET AND DISMISS.

[Filed in Circuit Court of Appeals April 12, 1943.]

Now come the defendants-appellees in the above-entitled case and file this motion to docket and dismiss the appeal taken by the plaintiffs-appellants against the judgment of the Supreme Court of Puerto Rico rendered July 3, 1942, on the following grounds:

FIRST. This case originated in the District Court of Ponce, Puerto Rico, by a complaint filed by the partnership Mario Mercado e Hijos, plaintiffs, *v.* Elvira Olivieri Commins et als., defendants, asking that certain deed of sale made by the defendant Elvira Olivieri Commins, to the other defendants, be rescinded, because in a previous deed of mortgage made by the said Elvira Olivieri Commins in favor of the plaintiffs, (Mario Mercado e Hijos) she promised that in the event that she (Elvira Olivieri Commins) would decide to sell the property mortgaged to plaintiffs, while the mortgage was unpaid, she would prefer as buyers the plaintiffs.

SECOND. The plaintiffs alleged in their complaint that the mortgage made by the defendant Elvira Olivieri Commins, in favor of the plaintiffs, was cancelled by payment of the amount of the mortgage to the assignee of the plaintiffs; that the plaintiffs had assigned the mortgage to a third party (the successors to Jose Tous Soto) and by such payment the mortgage was cancelled and extinguished in the registry of property of Ponce; but that the payment made by the debtor Elvira Olivieri Commins was the result of a conspiracy between said Elvira Olivieri Commins and the other defendants in order to deprive the plaintiffs of

the right (?) to acquire the property on the same conditions as sold to the other defendants.

THIRD. After a trial held at the District Court of Ponce, Puerto Rico, the court decided that there was no conspiracy or fraud whatsoever between Elvira Olivieri Commins and the other defendants and that Elvira Olivieri Commins had a perfect right to pay the mortgage and by so doing she was relieved from the promise to sell the plaintiffs the property and that she was at liberty to sell the property to any one she would choose. Once she paid the amount of the mortgage she was under no obligation to sell to the plaintiffs, because the condition to prefer the plaintiffs in case she would sell the property mortgaged, depended upon the fact that the mortgage was or not paid and that when the mortgage was paid and cancelled, then, there was no obligation on the part of Elvira Olivieri to regard the plaintiffs as prospective buyers.

FOURTH. The plaintiffs appealed from the judgment of the District Court of Ponce to the Supreme Court of Puerto Rico, and the Supreme Court on July 3, 1942 affirmed the judgment of the District Court.

FIFTH. The plaintiffs appealed from the judgment of the Supreme Court to this Circuit Court on the ground that the amount involved in this case is larger than $5,000 and we assent to that; but, we allege that the appeal taken by the plaintiffs is not justified and it has been taken to hinder and delay, because the only opportunity the plaintiffs had to obtain a rescission of the sale made by Elvira Olivieri Commins to the other defendants, was to prove fraud, but the District (trial court) Court decided, after considering all of the evidence, oral and documentary, that there was no fraud and the Supreme Court of Puerto Rico decided also that there was no fraud and furthermore that plaintiffs, according to the mortgage law of Puerto Rico, did not have any right of rescission and that the purchasers (the other defendants) were third parties or buyers in good faith.

SIXTH. In fact this case has been decided on a question of law by the trial court and by the Supreme Court of Puerto Rico, according to the mortgage law and the Civil Code of Puerto Rico, against the plaintiffs and both judgments have been rendered without doubt and as a simple question of law applicable to this country and we do not see any way or means to consider a reversal or modification of the findings of the trial court or of the Supreme Court of Puerto Rico, as to the fact that there was no fraud or conspiracy on this case on the part of the defendants. (See opinion of the Supreme Court of Puerto Rico in the typewritten transcript.)

SEVENTH. We find in the statement of appeal of the plaintiffs-appellants a gross mistake to which we believe we are obliged to call the attention of the court and that is, that the appellants at page 5 [printed page 502] of their statement on appeal, transcribe clause seventh of the mortgage deed, which refers to option to buy and lease, and they have failed to transcribe same correctly. The clause begins this way:—

> "Not withstanding the terms of the previous clause the debtor, as a part of the consideration of this contract, agrees with the partnership "Mario Mercado e Hijos" to give them preference for the sale or lease of her tenancy in common in the farms 'Indios and Juanita', on equal terms and price. . . ."

The correct transcription should be this way:

> "Not withstanding the terms of the previous clause the debtor, as a part of the consideration of this contract, agrees with the partnership 'Mario Mercado e Hijos', WHILE THE MORTGAGE HEREBY CONSTITUTED IS UNPAID, . . . to give them preference etc."

In other words, the very gist of the action, the legal point so elaborately discussed is left out from the clause, the condition that "WHILE THE MORTGAGE IS UNPAID", the plaintiffs could enforce the clause, which means that once the debtor paid the

ortgage she was under no obligation to sell to the plaintiffs but
d the liberty to sell to any one she desired.

Another point is that the plaintiffs assigned their mortgage to
ccession Tous Soto, but did not reserve the option to buy and
erefore, there was nothing shown in the registry of property to
op the defendants to negotiate with the debtor Elvira Olivieri
ommins.

A simple reading of the opinion of the Supreme Court of
erto Rico rendered by the Chief Justice, and the citations of
al law and jurisprudence contained therein, shall convince this
onorable Circuit Court that the judgment of the Supreme Court
not in any respect wrong but rendered according to law and
stice and that the appeal has been taken to hinder and delay
d is against the administration of justice.

Wherefore, defendants-appellees respectfully request that ap-
al be dismissed.

LUIS LOPEZ DE VICTORIA,
LEOPOLDO TORMES,
Attorneys for Defendants-Appellees
MANUEL FRANCISCO LLUBERAS ET ALS.

JOSE SABATER,
Attorney for Defendant-Appellee
ELVIRA OLIVIERI COMMINS.

Notified with a true copy of the above motion at Ponce, Puerto
ico, this seventh day of April, 1943.

PEDRO M. PORRATA,
Attorney for the Plaintiffs-Appellants.

JUDGMENT OF CIRCUIT COURT OF APPEALS.

August 23, 1943.

Upon consideration of the statement on appeal filed by appellant on March 26, 1943, the motion to dismiss filed by appellees on April 12, 1943, the memoranda filed by the parties thereon, and the typewritten transcript of record in this case, it is now, to wit, August 23, 1943, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed, under Rule 39 (b).

By the Court,

ARTHUR I. CHARRON, *Clerk.*

On September 17, 1943, mandate was stayed until further order of court.

CLERK'S CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages, numbered 1 to 518, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including November 5, 1943, in the cause in said court numbered and entitled,

No. 3883,

MARIO MERCADO E. HIJOS,
Plaintiff, Appellant,

v.

ELVIRA OLIVIERI COMMINS ET AL.,
Defendants, Appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this fifth day of November, A.D. 1943.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 28, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument immediately following No. 349, De Castro vs. Board of Commissioners of San Juan.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
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NOV 22 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 497

MARIO MERCADO E HIJOS,
Petitioner,

vs.

ELVIRA OLIVIERI COMMINS ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS, TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

WILLIAM CATTRON RIGBY,
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Attorneys for Petitioner

RIGBY, LEON AND WEILL,
FRED W. LLEWELLYN,
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 497

MARIO MERCADO E HIJOS,
Petitioner,

vs.

ELVIRA OLIVIERI COMMINS ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS, TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

INTRODUCTORY

Petitioner, Mario Mercado e Hijos, an agricultural civil partnership domiciled in Ponce, Puerto Rico, prays a writ of certiorari to the Circuit Court of Appeals for the First Circuit, to review its order or judgment entered August 23, 1943, affirming, under its Rule 39(b), without a hearing or opportunity for argument on the merits, the judgment of the Supreme Court of Puerto Rico in this case;—or, in the alternative, a writ of mandamus to such

Circuit Court of Appeals, directing it to set aside such order or judgment of August 23, 1943, and to hear and consider and decide on the merits the appeal to it heretofore taken by this petitioner from the Supreme Court of Puerto Rico in this case.

The Rule in Question

Rule 39(b) of the First Circuit Court of Appeals, adopted in the Revision of that Court's Rules effective September 20, 1940,—nine months after this Court's decision, January 2, 1940, in *Sancho Bonet, Treasurer, vs. Texas Company*, 308 U. S. 463, 470-472,—reads as follows:

> "(b) In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal that the judgment appealed from is 'inescapably wrong' or 'patently erroneous'. (*Sancho Bonet* v. *Texas Co.*, 308 U. S. 463 (1940)). The court will entertain a motion by the appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was neither 'inescapably wrong' nor 'patently erroneous', and consequently should not be disturbed by this court. Such motion, which may be united in the alternative with a motion to dismiss the appeal, may be filed within twenty days after the filing and serving of the statement on appeal. A brief in support thereof may be filed and furnished in the manner specified by Rule 25. The court may, however, upon its own motion, dismiss the appeal or affirm the judgment appealed from where the law and justice of the case so require; or, if the case is of such character as not to justify extended argument, the court may order the cause set down for immediate hearing."

Questions Presented

1. Is the foregoing rule valid? May the Circuit Court of Appeals thus abdicate the jurisdiction over appeals from the Supreme Court of Puerto Rico, vested in it by

the Congress by Section 128 (a) "Fourth" of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936; or the duty to hear and to consider and decide such appeals on the merits, upon briefs and arguments, in the same way as in other cases?

2. Was the decision of the insular Supreme Court of Puerto Rico so manifestly correct as to make any appeal from it necessarily "frivolous" and thus to warrant dismissal of the appeal without a hearing, on mere inspection of the face of the record, as was done by the Circuit Court of Appeals in this case?

3. Or, on the contrary, is not the decision of the insular Supreme Court in this case so "patently erroneous",—and, indeed, so "inescapably wrong",—as to require reversal at the hands of the Circuit Court of Appeals, or of this Court? *Or, in any event,* is there not presented by this record a *substantial question* of whether or not the insular Supreme Court's decision was not in reality "clearly wrong", or "patently erroneous", or, indeed, "inescapably wrong", within the meaning of this Court's decisions,—a question of sufficient substance, at least, to entitle the appellant [petitioner] to have it argued and considered and decided on the merits by the Circuit Court of Appeals, or by this Court?

Statement

This case originated in a petition to the Insular District Court of Ponce, Puerto Rico ("Civil Case" No. 311; R. 1-12), filed April 7, 1937, seeking the rescission of a sale the month before, March 9, 1937, from the respondent, Elvira Olivieri Commins, to the other respondents, of the plantation or estate known as "Indios," as having been fraudulently made, in direct violation of an option to purchase the property at the same price offered by any other purchaser [and requiring 30 days' notice of any offer, and an opportunity during that time to purchase at

the same price offered], held by the petitioner plaintiff, of which all the respondents were aware.

There is also a companion case filed the same day ("Civil Case" No. 312; R. 35) for the rescission of a lease likewise made by Mrs. Commins, the same day as the sale, March 9, 1937, to her nephew, Dr. Emilio Blasini Totti, and his wife, Mrs. Celia Lluberas Passarell, two of the respondents in the present case. Dr. Blasini's wife, Celia Lluberas Passarell, is a sister of the respondent, Manuel Francisco Lluberas Passarell, and of the other respondents, Antonia, Rosa Elena, Graciela, and Raquel Lluberas Passarell.

A chronological analysis of the facts is in Appendix II, following our Supporting Brief (infra, pp. 37-48).

The gist of the story is that in March, 1932, Mrs. Commins applied to the petitioner, Mario Mercado e Hijos, an "agricultural partnership," for a loan of something over $40,000.00 on her undivided half interest in two plantations or estates in Puerto Rico, "Indios" and "Juanita," then owned jointly by herself and her sister Santia. The Mercado partnership was the tenant of both estates, and had been for several years, under ten-year leases, made back in 1927 and in 1928. Half of the term of the "Indios" lease had thus already run. It would expire in June, 1937; that of "Juanita" had one year more to run, until 1938. The Mercado partnership was, of course, looking forward to the permanency of its enterprise, and thus interested in the future of these lands; particularly since they adjoined other lands owned by itself, as appears from their legal descriptions (R. 322-323), so that these lands that it held under lease were so situated as to be cultivated in connection with its own lands, in a single agricultural enterprise. Under these circumstances, when Mrs. Commins asked the loan [quite probably really a renewal of a former loan], the partnership wanted to be assured that in case she, or the sisters, should wish to sell the lands at any time, the partnership could have the right to buy them—or, if they were not sold, then to renew its

leases, at the same price that anyone else might offer. So the loan was made for seven years, upon promissory notes payable to "the bearer by endorsement" secured by a mortgage not specifically naming any particular mortgagee, but with a right to Mrs. Commins to pay it off at any time before maturity, upon three months' notice. And the option to the Mercado partnership to purchase or to renew its leases upon the same terms that anybody else might offer was agreed upon; and also that no partition of the lands should be made between the sisters, while the mortgage remained in force, without the consent of the Mercado partnership.

But instead of drawing two or three separate instruments embodying those different agreements, they were all put into one instrument of "voluntary mortgage" or deed for the public records (R. 322; Exhibit "J");—[although the option for the benefit of the Mercado partnership to secure the future of its agricultural enterprise was plainly no part of the security to the "bearer" notes secured by the mortgage; but was an independent major consideration to the partnership, inducing it to make the loan].

The next year, in May, 1933, the Mercado partnership sold the "bearer" promissory notes to the heirs of Jose Tous Soto, deceased, but with some reservations. It appears that the guardian's purpose in purchasing was to provide a regular monthly income for the heirs, some of whom were minors at that time. Mrs. Commins' "bearer" promissory notes bore interest at 9% per annum, payable semi-annually, as above noted. But in order to get a secure income for the heirs, in such form that they could receive it regularly every month, the guardian,—with the approval of the District Court in the guardianship proceedings,—was willing to accept a slightly lesser rate of income than the 9%; *provided* it could be made payable monthly, and absolutely guaranteed. And so the arrangement was made, and embodied in a formal deed approved by the court and recorded, dated May 9, 1933, by which the Mer-

cado partnership assigned to the heirs the "mortgage credits," by delivering to them the "bearer" promissory notes, and absolutely guaranteeing, itself, to pay to them in *monthly installments* an amount equal to 8¼% per annum on the notes; and, in consideration of such guarantee, was itself "*entitled to retain*" ¾ of 1% out of the 9% semi-annual interest on the notes. (Deft.'s "Exhibit 2," "*Third*"; R. 397, 406).

This, of course, left in the Mercado partnership a substantial, active, interest in the Commins indebtedness; and apparently contemplated that the partnership would continue to collect the semi-annual interest itself, and would itself pay over the monthly installments to the heirs at the stipulated lesser rate of 8¼%. No formal assignment of the mortgage deed was made; and nothing was put on the public records at that time specifically mentioning the Mercado partnership's option or its right to be consulted and to be asked for its "consent" to any partition of the lands between Mrs. Commins and her sister,—the provisions of Paragraphs "Seventh" [the option] and "Eleventh" [consent to partition] in the original March, 1932, deed.

And it was clearly understood between the parties that, in fact, the option was not intended to be assigned, but was reserved to the Mercado partnership, as was also the right to be consulted and to give its "consent," upon any partition of the lands. The heirs themselves expressly affirmed that this was the understanding, by formal deed approved by the District Court in the guardianship proceedings, four years afterward; apparently as soon as the question was called to their attention [deed of March 31, 1937; Exhibits "E" and "F"; R. 281, 284; 286, 291-301).] And that such was actually the understanding at the time, was shown on the public records later on, by the fact that upon the partition of the lands between Mrs. Commins and her sister three years afterwards, on August 20, 1936,—before any of the questions here involved had arisen,—*it was the Mercado partnership,*—and not the Jose Tous Soto heirs,—*who appeared with the parties in the formal parti-*

tion deed for the purpose of giving its "consent" to the partition under Paragraph "Eleventh" of the original 1932 deed. (District Court's Findings of Fact; R. 38.)

And the District Court itself expressly found in its "Findings of Fact" (R. 39), copied also with approval by the insular Supreme Court in its opinion (R. 481-482), *that all the respondents were in fact aware* that such was really the understanding, and *that the option was still the property of the Mercado partnership.* [A copy of the 1933 assignment to the heirs had been given to Mrs. Commins at the time; R. 37].

It appears that shortly after making the partition of the lands with her sister in August, 1936, Mrs. Commins began to think about selling the part that had thus come to her.

Although the mortgage still had considerably more than two years yet to run until its maturity on March 23, 1939, yet, as early as December, 1936, only a few months after the partition, Mrs. Commins was writing to Mario Mercado about it; and, as the District Court finds, from then on she was negotiating about it with the Mercado partnership through her son-in-law, Rafael Barletta; and she kept up these negotiations until the very day that she closed the sale and lease here assailed, to other parties, the respondents here; without giving any notice to the Mercado partnership that she had even had any other offer, or that she was dealing with anyone else at all,—despite the option held by the partnership, of which, as the District Court found, as above noted, not only she herself, but also all the other respondents, were aware, and despite the fact that the partnership stood ready to pay the same amount as any other purchaser or to renew its leases for a future term on as favorable a rent and conditions as anyone else might offer. (*Findings;* R. 38-39; 481.)

The explanation is that some time along in January or early February, 1937, Mrs. Commins happened to have a talk with an old friend, Mrs. Elena Passarell-de-Delgado, the mother of the respondents Manuel Francisco, Antonia

Rosa Elena, Graciela, Celia, and Raquel Lluberas Passarell, —whose daughter Celia is married to Mrs. Commins' nephew, Dr. Emilio Blasini Totti, likewise one of the respondents here. It is an old family friendship and connection. Mrs. Elena Passarell de Delgado's ["Dona Elena's"] husband, then recently deceased, had been candidate for Mayor of Ponce, and apparently an influential man. Mrs. Commins had known the younger members of the family practically ever since their birth.

This talk was had while Mrs. Commins' negotiations with the Mercado partnership were under way for a sale or a new lease of the properties to it. [It will be remembered that its ten-year lease of "Indios" was to expire in the following June, 1937; and that of the other estate, "Juanita", the next year. But that Mrs. Commins' mortgage loan still had more than two years to run, until March 23, 1939.]

"Dona Elena" offered her friend Mrs. Commins ["Dona Elvira"] $40,000.00 for "Indios", for the benefit of Dona Elena's children, respondents here, *provided* that Mrs. Commins would also lease to the latter's own nephew, Dr. Emilio Blasini Totti (husband of Dona Elena's daughter Celia), the other estate, "Juanita", for ten years after the expiration of the Mercado partnership's lease.

Mrs. Commins wanted to accommodate her friend, and to benefit her nephew and the family connections. She preferred them to have the property, rather than to have it go to the partnership on the same terms,—(although her relations with the partnership were also friendly, up to that time).

To accomplish this purpose, and to evade the partnership's option, they resorted to the trick of having Mrs. Commins give a $45,000.00 mortgage to Manuel Francisco Lluberas Passarell on February 25, to run for only six months, and allowing him, as special attorney in fact for Mrs. Commins, to retain the whole $45,000.00 in his hands; and then he turned around, and,—[apparently with money furnished by his mother, Dona Elena, as a gift for the benefit of her children],—paid the amount of the old 1932 mort-

gage indebtedness to the Jose Tous Soto heirs, together with three months' interest in advance because of the loan's being paid two years before maturity,—[and apparently *not calling their attention* to the facts that they were entitled to three months' notice before such a payment in advance, and that the Mercado partnership as holder of a part of the mortgage indebtedness (*its 3/4 of 1% per annum share of the interest under the 1933 assignment*),—as well as because of its rights under the option,—was likewise entitled to the notice,—but, instead, threatening the heirs with a suit if they did not immediately cancel the mortgage][1],—and thus secured a deed of cancellation of the mortgage (Exhibit I, recorded March 8, 1937; R. 312-321).

With that cancellation in hand,[2] the trap was sprung. The deed of sale to Manuel Francisco Lluberas Passarell and his sisters, of "Indios",—and the lease to Mrs. Commins' nephew, Dr. Blasini (whose wife, Celia, is one of the sisters),—of the other estate, "Juanita",—were executed and put on record the very next day, March 9, 1937.

The Mercado partnership, this petitioner, promptly made a formal demand for the rescission of the deed and the lease, and to be subrogated to the respondents as purchasers and lessee, respectively, under its option; and offered payment of the same purchase price received from the others; and upon refusal deposited the money in court, and began these suits.

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[1] A threat for which there was no possible basis whatever, particularly in view of the mortgagees' right to three months' notice before accepting an advance payment. (Clause "Ninth"; R. 327).

[2] Thus procured behind the backs of the Mercado partnership, without any notice to them whatever, and at the very time when Mrs. Commins, through her son-in-law, Barletta, was actually carrying on negotiations with the partnership for a sale or for a renewal of the leases to them. [Finding of the District Court R. 38-39; see also R. 130-135; 142-147; 179-181 and 381-383; and also Appendix II, *infra* pp. 44-46].

District Court's Opinion

The District Court sums up the pleadings in its opinion ("Statement of the Case," R. 31-35); and finds the facts ("Findings of Fact," R 36-39) with substantial accuracy, so far as its findings go; but it omits to mention or make any findings upon several of the essential facts. It is noteworthy that it does find, however, among its other findings, that, as above indicated, before the sale and the lease in question executed March 9, 1937, all the respondents actually

> *"were advised", "of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates 'Juanita' and 'Indios'* (R. 39);

and that neither Mrs. Commins nor any of the other respondents ever notified the petitioner that they contemplated any sale or lease of the properties (R. 38); and also that the petitioner partnership "always was and is now ready to subrogate itself to the place of the purchasers and lessees of said estates for the same price and rental and on the same terms as those of the contract of sale and lease whose rescission is hereby sought" (R. 38-39).

And also further that (R. 39), from Mrs. Commins' own testimony,

> "it appears as a fact that she authorized her son-in-law, Rafael Barletta, to enter into negotiations with Mario Mercado e Hijos for the lease or sale of the estates Juanita and Indios";

and that from other testimony and from telegrams and letters in evidence, it likewise appears "as a fact" (R. 39, *supra*), that from the preceding December, 1936, all through the winter, and up to March [3] 8, 1937,—the day before the

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[3] The Opinion reads "*May*" 8; but this is clearly a clerical error. It should read "*March* 8." (Confer, Footnote, p. 42, *infra*, Appendix II, p. 43).

actual execution of the sale and lease to the other respondents,—this son-in-law, Rafael Barletta, had been actually holding conversations and meetings with the manager and other officials of this partnership petitioner, "in regard to the possible purchase and lease of said immovables from Elvira Olivieri Commins to the plaintiff partnership."

Nevertheless, the District Court found against the petitioner, and refused to set aside the March 9, 1937, sale and lease; **simply on the legal ground** that the option, although running specifically to this petitioner partnership, by name, had originally been included as clause "Seventh" in the same deed by which a "voluntary mortgage" was constituted by Mrs. Commins on March 23, 1932, to secure her four seven-year mortgage notes payable to bearer, aggregating $41,256.89, originally held by the petitioner partnership but afterwards assigned by it, the next year, May 9, 1933 [although with some restrictions of record in the assignment deed][4] to the heirs of, Jose Tous Soto, deceased, and that in thus assigning the notes ("mortgage credits") the petitioner had neglected to recite of record, in the formal deed of assignment filed for record in the Public

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[4] Including the right to "*retain*" ¾ of 1% per annum of the interest on the notes, which were payable semi-annually, this retaining being expressed to be in consideration for the partnership's undertaking to pay the amount of the balance of the interest over to the assignees in *monthly installments,* instead of only semi-annually as it was collected from Mrs. Commins, and also absolutely to guarantee the Heirs both the principal and interest and the payments in such monthly installments, and also to protect them against any taxes, federal, insular or municipal, that might be levied upon it at any time,—so as certainly to secure to the heirs a steady monthly income in any event. This, which appeared of record in the Public Registry, manifestly contemplated that the assignor partnership, the petitioner here, should *retain an active interest in the mortgage deed,* and was not assigning the whole instrument outright. [*Confer* Appendix II, *infra,* pp. 40-42].

Registry, in so many words, the fact that it was not assigning, but on the contrary was reserving to itself, the option running specifically in its own favor in the independent clause "Seventh" in the original deed of 1932 (R. 40-42);—[*although*: (1) The Court itself expressly found, in its "Findings of Facts" as above stated, that all of the respondents did actually know, before the making of this March 9, 1937, sale and lease, that the petitioner-partnership really still owned the option itself, and had not transferred it; and despite (2) The fact that the Jose Tous Soto heirs themselves, the assignees of the mortgage notes, had acknowledged in a solemn deed of record made on March 31, 1937 (Exhibits "E" and "F", *supra; ante,* p. 6), as soon as their attention was called to this question,—[and with the formal approval of the District Court in guardianship proceedings on behalf of one of the heirs who was a minor and another who was "incapacitated"],—the fact that this option had actually been so reserved by the partnership in making the original assignment in 1933 (R. 281, 284; *confer* Appendix II, *infra,* pp. 41-42); and although (3) Insofar as the public notice in the Registry might have any bearing at all in a case like this, where there was actual notice by all of the parties concerned,—the requisite notice of record of the fact of the partnership's still continuing ownership of the option and its active rights and interest in the original deed of 1932, was shown of record in the partition deed made August 20, 1936, between Mrs. Commins and her sister, Santia,—*three years after the assignment of the mortgage notes, as above, to the Jose Tous Soto heirs,*—in which the plaintiff partnership, Mario Mercado e Hijos, *and not the heirs of Jose Tous Soto,*—appeared and took part as being the party consenting to the partition, under clause "Eleventh" (R. 5) of the original 1932 deed.[5]

[5] Respondent-defendants' own answers in the District Court each specifically admit plaintiff's allegation that it was the petitioner partnership who thus "gave its consent to the said partition." (Complaint, Par. 10, R. 8; Answers; Par. "Tenth," R. 22; Par. "Sixth," R. 27).

The District Court none-the-less concludes that (R. 42):

> "when Mario Mercado e Hijos conveyed to the heirs of Tous Soto the mortgage credit, it also conveyed the rights embodied in clause 7 of the option to sell and lease."[6]

In support of this conclusion, the District Court relied upon Article 152 of the Mortgage Law and Section 1418 of the Civil Code of Puerto Rico, and referred also to Sections 1233, 1235, and 1759 of the Civil Code, and Section 26 of the "Law of Evidence"; and also to five decisions of the Supreme Court of Puerto Rico, none of which really appears to support it at all, as is pointed out in our Supporting Brief (*infra*, pp. 23-27).

The insular Supreme Court, after noting that it had denied the respondents' (Appellees' in that Court) motion to dismiss petitioner's appeal to it, because the appeal presented *substantial questions that "were not plainly frivolous"* (R. 475), copied (R. 478-486) the District Court's "Findings of Fact" and determination of the "Questions of Law," *supra*, and held (R. 487):

> "If the plaintiff when assigning its promissory notes to the Heirs of Tous Soto had expressly reserved to itself the right of option, and if when recording the

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[6] But in saying this the Court also manifestly overlooked the fact that there is no pretense that any notice of the contemplated sale and lease of March 9, 1937, was ever given to the Jose Tous Soto heirs, any more than to the partnership itself, by any of the respondents. It is perfectly manifest that if any such notice had been given to those heirs they would have transmitted it to the plaintiff partnership which they themselves clearly recognized as still retaining the option, and therefore as entitled to the notice. Nobody has ever even suggested that the assignment to the heirs ever *cancelled* the option. It was still in existence, and was certainly owned either by the partnership or else by the heirs; and hence, either one or the other was entitled to the notice. *But no notice was ever given to anybody.* (*Confer* Supporting Brief, *infra*, Point III, pp. 27-28.)

> assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them";

thus in its turn completely ignoring,—as had likewise the District Court,—the express finding of the District Court,—[which the Supreme Court itself had copied with apparent approval, in its own opinion (R. 481-482],—that both Mrs. Commins and also all of the other respondents *had actually had full notice,*—

> "were advised, prior to the execution of the contract of sale and lease, of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios."

Judgment of the Circuit Court of Appeals

The plaintiff, this petitioner, appealed from the insular Supreme Court to the Circuit Court of Appeals, First Circuit (R. 490-491), and filed its "Statement of Points" (R. 495-498) and its "Statement on Appeal" (R. 498-513) in that Court, both on March 26, 1943.

Respondents, appellees there, appeared and filed on April 12, 1943, their "motion to docket and dismiss" (R. 514-517) on the ground that the appeal involved only questions of local law, and that (R. 517) a "simple reading of the Opinion of the Supreme Court of Puerto Rico" should be enough to convince the Circuit Court of Appeals that the judgment "is not in any respect wrong", and "that the appeal has been taken to hinder and delay and is against the administration of justice."

Upon that basis, the Circuit Court of Appeals, without affording appellant [petitioner] any opportunity for full hearing or argument, entered its order or judgment on August 23, 1943, granting appellees'-respondents' motion, and ordering (R. 518) that:

"Upon consideration of the statement on appeal filed by appellant on March 26, 1943, the motion to dismiss filed by appellees on April 12, 1943, the memoranda filed by the parties thereon, and the typewritten transcript of record in this case, it is now, to wit, August 23, 1943, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed, under Rule 39(b)."

Statutes

Pertinent constitutional and statutory provisions, federal and insular, are in Appendix I (*infra*, pp. 33-36).

Petitioner's Position

Petitioner believes, and submits;

First. This case presents a substantial question, worthy of consideration on its merits, upon full briefs and argument in the usual way, by the Circuit Court of Appeals, as to the correctness of the decision of the insular Supreme Court. It is believed that that decision was clearly wrong, "patently erroneous," and even "inescapably" so; and that petitioner was entitled to have the question of whether or not it really was so, considered by the Circuit Court of Appeals, upon full argument.

Second. Rule 39(b) of the Circuit Court of Appeals for the First Circuit, adopted September 20, 1940, shortly after the decision of this Court on January 3, 1940, of the case of *Sancho Bonet, Treasurer, vs. Texas Co.*, 308 U. S. 463, 470-472, reflects a misunderstanding by that Circuit Court of the decisions of this Court in the *Sancho Bonet, Treasurer, vs. Texas Co.* case and in the earlier case of *Sancho Bonet, Treasurer, vs. Yabucoa Sugar Co.*, 306 U. S. 505, 509-511.

This Court did not in those cases indicate any intention to change in any way the rule as to the respect to be accorded to the decisions of a Territorial court of last resort concerning questions of fact or of local law, that had been

unvaryingly recognized and enforced by this Court for more than sixty years previously, alike in cases coming from the old Territories within the continental United States, and, since 1898, from Hawaii, the Philippines, and Puerto Rico.

So far from expressing any intention to vary that rule, this Court expressly said in the *Sancho Bonet vs. Texas Co.* case, *supra*, (at p. 470);

> "For over sixty years this Court has consistently recognized the deference due interpretations of local law by such local courts unless they appeared to be clearly wrong. From *Sweeney v. Lomme*, 22 Wall. 208, decided in 1874, to *Bonet v. Yabucoa Sugar Co., supra*, decided in 1939, repeated admonitions to that effect have been given. That rule is founded on sound policy."[1]

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[1] *Confer: Sweeney v. Lomme, supra*, 22 Wall. 208, 213; *Northern Pacific R. R. Co. v. Hambly*, 154 U. S. 349, 361; *Fox v. Haarstick*, 156 U. S. 674, 679; *Copper Queen Consol. Min. Co. v. Territorial Board of Equalization*, 206 U. S. 474, 479; *Lewis v. Harrea*, 208 U. S. 309, 314; *English v. Arizona*, 214 U. S. 359, 361; *Santa Fe County v. New Mexico*, 215 U. S. 296, 305; *Albright v. Sandoval*, 216 U. S. 331, 339; *Lewers & Cooke v. Atcherly*, 222 U. S. 285, 294; *Treat v. Grand Canyon R. R. Co.*, 222 U. S. 448, 452; *Ker & Co. v. Couden*, 223 U. S. 268, 279; *Clason v. Matko*, 223 U. S. 646, 653; *Gray v. Taylor*, 227 U. S. 51, 57; *Cordova v. Folgueras*, 227 U. S. 375, 378-379; *Phoenix R. R. Co. v. Landis*, 231 U. S. 578, 579-580; *Texas & Pacific R. R. Co. v. Railroad Commissioner*, 232 U. S. 338; *Santa Fe C. R. Co. v. Friday*, 232 U. S. 694, 700; *Nadal v. May*, 233 U. S. 447, 454; *Gilson v. United States*, 234 U. S. 380, 383, 384; *Villanueva v. Villanueva*, 239 U. S. 293, 298-299; *Diaz v. Gonzalez*, 261 U S. 102, 105-106; *Fernandez vs. Ayllon*, 266 U. S. 144, 146; *Matas vs. Alonso Hermanos*, 300 U. S. 429, 432; *Wailau Co. v. Christian*, 305 U. S. 91, 109; *Inter-Island Co. v. Hawaii*, 305 U. S. 306, 311; *all leading up to the emphatic statement of the same rule in Sancho Bonet, Treasurer v. Yabucoa Sugar Co., supra*, 306 U. S. 505, 509-511; *and in Sancho Bonet, Treasurer v. Texas Co., supra*, 308 U. S. 463, 470-472.

Third. Throughout all those years, and in all those cases where under the old statutes a direct appeal from the Territorial supreme courts lay to this Court [and in later cases from the Philippines in cases where a direct appeal lay to this Court], this Court, while always consistently recognizing and applying this rule of the respect to be accorded to decisions of the Territorial courts of last resort upon questions of fact and of local law, yet appears never to have failed to examine carefully and at length, and upon full briefs and argument, as in any other case, any appeal coming to it as of right, under the Act of Congress, from any Territorial court of last resort; and so likewise the Circuit Courts of Appeal for the Ninth Circuit, and for the First Circuit, since having had vested in them respectively, by the Congress, jurisdiction over appeals from the Supreme Courts of Hawaii and of Puerto Rico, have steadily and consistently in applying such rule, and in citing and following the decisions of this Court recognizing and enforcing it, patiently examined and heard on briefs and full argument, as in any other case, all appeals coming to them as of right under the Acts of Congress from those courts respectively,[8]—*with the sole exception of the new practice now adopted in the First Circuit* under this new Rule 39(b) of that Circuit, here involved.

Fourth. The Circuit Court of Appeals for the First Circuit has itself, even since the adoption in 1940 of this Rule 39(b), recognized and acted upon its statutory duty under the Act of Congress to entertain appeals from the

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[8] *Confer: Richardson v. Fajardo Sugar Co.*, 237 Fed. 195, 196; *Loiza Sugar Co. v. People of Puerto Rico*, 57 F. (2d) 705, 706; *Porto Rico Coal Co. v. Domenech*, 41 F. (2d) 183, 185-186; *Russell & Co. v. Sancho Bonet, Treasurer*, 92 F. (2d) 821, 822; *Hawaii Consol. Co. vs. Borthwick*, 105 F. (2d) 286, 288; *Walker vs. O'Brien*, 115 F. (2d) 956, 957.

Supreme Court of Puerto Rico; even although saying that under this established rule of this Court as to the respect to be accorded to the decisions of Territorial supreme courts in local questions: "Appeals in such cases are therefore likely to be futile and merely to cause needless delay and expense". *De La Torre v. National City Bank*, 110 F. (2d) 381, 383; and see also, *Same Case*, 110 F. (2d) 976, 983; and likewise the recent case, decided June 14, 1943, of *DeCastro v. Board of Commissioners of San Juan*, 136 F. (2d) 419, 425-426.

In the *De La Torre case, supra*, that Court in denying a motion there made to dismiss the appeal on this very ground that the case involved "purely a question of local law," said (110 F. (2d) 381, *supra*, at p. 383);

> "under Section 128 of the Judicial Code, 28 U. S. C., Section 225, appeal to this Court is conferred as a matter of right, provided the jurisdictional requisites are present. We cannot therefore dismiss the appeal on the first ground urged by appellee."

And in the recent *De Castro* case against the *Board of Commissioners of San Juan, supra*, that court again, while very strongly expressing its feeling that under the rule of this Court its functions, in passing upon appeals from the Supreme Court of Puerto Rico, may be reduced to requiring it "to act practically as a rubber stamp, or else to be reversed by the Supreme Court of the United States," nevertheless recognized and acted upon its statutory duty to entertain the appeal, saying (136 F. (2d) 419, *supra*, at p. 425);

> "But as the law now stands litigants bring these cases to us as a *matter of right*, and we have to pass on them." (*Italics supplied.*)

Those recent decisions of that Circuit Court itself appear to recognize the impropriety and the invalidity of its Rule 39(b) here in question; as well as the jurisdiction, and con-

sequently the duty, of that court to hear cases coming from the insular Supreme Court of Puerto Rico, in just the same manner as it hears cases coming to it on appeal from other courts.

Fifth. When a court possesses jurisdiction, *it is its duty* to exercise its jurisdiction, and to proceed to hear the case. It may not abdicate its jurisdiction; nor deny to an appellant bringing an appeal within its jurisdiction from one court, the same kind of full hearing that it grants to appellants bringing to it appeals within its jurisdiction from other courts. To do so is to deny to such appellants from the one court the equal protection of the laws, and due process of law.

And the duty of a court to exercise its jurisdiction may be enforced by mandamus. *Ex parte Kawato*, 317 U. S. 69, 71; *Roche v. Evaporated Milk Association*, 319 U. S. 21, 26, 32; *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 546; *McClelland v. Carland*, 217 U. S. 268, 279-282; *Ex parte Bradley*, 7 Wall. 364, 376; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 270-271; *Ex parte Russell*, 13 Wall. 664, 669-671; *Ex Parte Simons*, 247 U. S. 231; *Hudson v. Parker*, 256 U. S. 277, 288-289.

Sixth. It follows that it was the duty of the Circuit Court of Appeals in the present case, despite its "Rule 39(b)", to hear on full briefs and argument this appeal coming to it from the Supreme Court of Puerto Rico, in the same way that it hears appeals within its jurisdiction coming to it from other courts; and that it was grave error to sustain appellees' (respondents') motion to dismiss the appeal, and to affirm, *pro forma*, the judgment of the insular Supreme Court, without giving to this petitioner-appellant the opportunity for a full hearing.

Seventh. The decision of the insular Supreme Court of Puerto Rico was clearly wrong, and should be reversed, for the reasons hereinbefore indicated, and stated more at length in the Supporting Brief (*infra*, pp. 23-29), and in petitioner's (appellant's) "Statement of Points" in the Circuit Court of Appeals (R. 495-498).

Reasons for Granting the Writ

This case presents an important question of federal law, of the validity and application of this Rule 39(b) of one of the Circuit Courts of Appeal [the First Circuit], which has not been, but it is believed should be settled by this Court. The practice followed by that Court in this case under that Rule, of denying to the appellant in an appeal coming to it under its statutory jurisdiction from the insular Supreme Court of Puerto Rico, the same opportunity for a full hearing upon briefs and oral argument which is accorded by it to appellants in other cases within its jurisdiction coming to it from other courts, is believed to be a denial of due process of law and of the equal protection of the laws, and to be such a departure from the accepted and usual course of judicial proceedings, and to be so in conflict with the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision, and the issuance of a writ of certiorari, or in the alternative of a writ of mandamus, to that end.

The decision of the insular Supreme Court of Puerto Rico was clearly wrong, and should be reversed.

It is therefore respectfully requested that this petition be granted, and that a writ of certiorari issue,—or in the alternative a writ of mandamus,—to the Circuit Court of Appeals for the First Circuit, and that upon a hearing the judgment of the Supreme Court of Puerto Rico affirming that of the District Court of Ponce, Puerto Rico, be reversed, and that petitioner-plaintiff be granted the relief prayed in its two original petitions Nos. 311 and 312, in the District Court of Ponce.

Respectfully submitted

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BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the insular District Court of Ponce ("Statement of the Case and Opinion of District Court"; R. 31-44) is not officially reported. The Opinion of the Supreme Court of Puerto Rico, July 31, 1942 (R. 474-487) is reported in 60 P. R. Dec. 877 (*Spanish edition*). It has not yet appeared in the English edition of the Puerto Rico Reports.

There is no written opinion by the Circuit Court of Appeals. Its "judgment" of August 23, 1943 (R. 518) upon the "motion to dismiss" filed by appellees there (the respondents here), by which it is

> "here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed, under Rule 39(b),"

has not yet appeared in the Federal Reporter.

The former opinion of the insular Supreme Court of Puerto Rico, which was adverse to the respondents here and favorable to this petitioner, denying ejectment to the respondents, to which reference is several times made in the transcript of the record here (R. 475, 496, 498), is reported in 55 P. R. Dec. 41 (*Spanish edition*), but has not yet appeared in English edition of the Puerto Rico Reports.

Jurisdiction

The jurisdiction of this Court to issue the writ of certiorari is invoked under Section 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

Its jurisdiction to issue the writ of mandamus is invoked under this Court's inherent constitutional power to issue the recognized common law writs in aid of its appellate jurisdiction.

More than $5,000.00 is involved, as is expressly admitted also by the respondents themselves (R. 498-499, 513, 515).

Questions Presented

The questions here presented are stated in the petition ("Questions Presented", *ante*, pp. 2-3).

Statutes

As is indicated in the Petition (*ante*, p. 15), pertinent constitutional and statutory provisions, federal and insular, are in Appendix I (*infra*, pp. 33-36).

Specification of Errors To Be Urged

These are indicated under the headings "Questions Presented", "Petitioner's Position", and "Reasons for Granting the Writ" in the Petition (*ante*, pp. 2-3, 15-19, 20).

Summary of Argument

The argument is summarized under the headings "Petitioner's Position" and "Reasons for Granting the Writ" in the Petition (*ante*, pp. 15-19, 20); and in the "Subject-Index" preceding it (*ante*, pp. I-II).

Statement of the Case

The case is stated in the Petition ("Statement," *ante*, pp. 3-9). A chronological analysis of the facts is in Appendix II (*infra*, pp. 37-48).

Opinions of the District Court of Ponce and of the Supreme Court of Puerto Rico

The gist of the opinions of these Courts is summarized in the Petition (*ante*, pp. 10-14).

ARGUMENT

First

The judgment of the Supreme Court of Puerto Rico was clearly wrong; even "patently erroneous", or "inescapably wrong."

Point I

A. **The District Court ignored its own finding that all of the respondents had express actual knowledge of this petitioner's ownership of the option**, and wrongfully applied the rules of the mortgage law concerning recording in the registry which could only have been applicable in the absence of such actual notice; and it misapplied the rule of Section 1418 of the Civil Code relating to the interpretation of contracts when the parties to a contract differ among themselves as to its meaning; so as improperly to hold in this case, where is no misunderstanding or difference between the parties themselves as to the meaning of this 1933 assignment, that it meant something wholly different from what either of the parties themselves understood it to mean—[and of which all the respondents here also actually had notice, as the Court itself had just found in its "Findings of Fact"; viz., that the option was not intended to be assigned but was reserved and still owned by this petitioner],—the Court nevertheless holding that it was constrained by Section 1418 of the Civil Code to construe the assignment of the mortgage notes as necessarily carrying the option with it, despite the contrary intention of both parties to the contract.

B. In so holding the District Court relied upon the provisions of the first clause of Section 1233 of the Civil Code directing that: "If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed" (Appendix, *infra*, pp. 33-34). But in so holding the Court ignored both the provision of the second clause of the same Section 1233 that:

> "If the words should appear contrary to the evident intention of the contracting parties, *the intention shall prevail*" (*Italics supplied*);

and also the similar provisions of the next succeeding sections of the Code, Sections 1234, 1235, 1236, 1237, 1238, and 1239 (Appendix, *infra*, p. 34) emphatically directing that *it is the actual intention of the parties* at which the Court should endeavor to arrive.

C. And in this holding the Court also, without any discussion or analysis of the 1933 assignment deed, *in assuming* that its words "are very explicit and do not leave any room for doubt as to the intention of the contracting parties" (R. 40) not only completely ignores the fact which it had itself found that the mutual intention of both the contracting parties was that its meaning was directly to the contrary of what the Court is here assuming concerning it; but also completely ignores the terms of the instrument itself, insofar as, on its face, it did not purport to be a complete outright assignment of the mortgage, but, on the contrary, an assignment only of the mortgage "in part"[*], expressly reserving to the assignor, the Mercado partnership, the right to "*retain*" a portion of the interest on the notes in consideration of its undertaking a new obligation to pay (and absolutely to guarantee the payment of) *monthly* installments of the interest to the heirs, which interest it could itself collect only *semi annually* from Mrs. Commins, the mortgagor. This significant provision, in addition to the fact of nothing whatever being said in that instrument regarding either the option under clause "Seventh" of the 1932 mortgage, *running directly to the Mercado partnership*, and *not to the holders of the mortgage notes*,—or as to the right to be consulted and asked to "consent" in case of any proposed partition of the

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[*] "in part": The wording of Article 152 of the Mortgage Law.

lands between Mrs. Commins and her sister Santia, which the Court also completely ignores.

D. *The Court also in that connection likewise completely ignores the practical construction of that assignment instrument which was put of record,* and became notice to the world on the public Registry, *when, three years later,* on August 20, 1936, upon the partition of the lands between the two sisters, *it was the Mercado partnership,* and not the Jose Tous Soto heirs, *which took part,* "intervened", *in the partition deed for the purpose of giving its "consent" to the partition,* as even the respondents themselves all expressly admit in their several Answers in the District Court (R. 22, Par. "Tenth"; R. 27, Par. "Sixth").

E. The Court very clearly erred in this holding that the recording laws, the Mortgage Law,—or the Civil Code of Puerto Rico,—were intended by the Legislature to, or do actually, override the mutual intentions of the parties to a contract, where there is no misunderstanding or difference of opinion between the parties themselves about it, and where all the other parties to the case actually had notice of that mutual understanding of the terms of the contract.

To the exact contrary, the provisions of Sections 1233 to 1239 of the Civil Code (Appendix I, *infra,* taken together, *strongly emphasize* that it is the *intention* of the parties which is to govern.

[redacted]

Point II

And the Court also clearly misapplied Section 1759 of the Civil Code (Appendix I, *infra,* p. 35) in saying that (R. 41), "according to Section 1759 of the Civil Code the mortgage is essentially indivisible", and thereupon concluding, without further discussion, that (R. 41, *supra*): "The option to sell and lease was substantially part of said contract, and, therefore, it was inseparable from the mortgage".

A. In support of this proposition the Court quotes

Llinas v. Mariani, 47 P. R. R. 543; *Montilla v. Van Syckel et al.*, 8 Puerto Rico Rep. 153; and *Puente v. Perez et al.*, 7 Puerto Rico Rep. 181; *none of which remotely supports the Court in this proposition.* Nor does a full reading of Section 1759 itself. [It is copied at length in Appendix I, *infra*, p. 35]. It deals with the division of a mortgage debt into aliquot parts, among several holders (creditors), or among several debtors; and directs that even though the mortgage indebtedness be thus distributed, yet the mortgage securing it remains one and "indivisible", for the benefit of all of them.

B. So far as that section is applicable to this case at all, it would seem to mean that upon the partial assignment of the mortgage indebtedness, in 1933, to the Jose Tous Soto Heirs, the Mercado partnership expressly retaining a part of it—[the ¾ of 1% per annum out of the annual interest, with the obligation on its part to continue to collect the whole 9% semi-annual interest payments from the mortgagor, and to pay over the reduced amount of 8¼% to the heirs, but in absolutely guaranteed monthly payments, so as to produce a regular, and certain, monthly income for the heirs],—the mortgage securing the notes was not thereby divided up into aliquot parts, but still remained "indivisible" in the hands of the Mercado partnership for the benefit of all of the holders of the indebtedness. And that, of course, *a fortiori*, the wholly independent agreements embodied in the deed of March 23, 1932, in its clauses "Seventh" and "Eleventh", embodying respectively the option and the right to be asked to "consent" to any partition of the lands between the two sisters,—both these covenants running specifically, by name, to the Mercado partnership, and not, generally in favor of the holders of the indebtedness (the mortgage notes), as did clause "Second" of that deed (R. 325-326) which constituted the mortgage in favor of the holders of those "bearer" notes, whomsoever they might be,—remained undisturbed, and unaffected in any way, by the delivery of the "bearer" notes to the heirs.

C. Bearing this in mind it appears wholly consistent with the actual intention of the parties that there was no assignment of the mortgage itself outright, and no assignment of these clauses or covenants of the 1932 deed, to the heirs,—the purpose being, of course, to reserve the rights under those clauses, undisturbed, in the ownership of the Mercado partnership. And the assignment deed, assigning as it did only a portion,—[although, of course, by far the major portion],—of the mortgage credits to the heirs, and not specifically assigning the mortgage itself, nor any of the separate covenants in it, accurately expresses that limited purpose. It was accurately done; it was by no means slipshod work; it was good conveyancing. It is not to be read as carrying more than it actually said, and certainly not to the extent of interpreting it to transfer this independent property right in the option, which, most clearly, neither of the parties intended it should carry,—and thus to override, merely by implication, the actual intent of all the parties to it.

D. It should be borne in mind that the Jose Tous Soto heirs do not appear to have been in the farming business; so that the option right was of no value to them. It added nothing to the security of the mortgage. On the other hand, it was of great value to the permanency of the enterprise of the Mercado agricultural partnership to have the right to renew its leases on the lands it was cultivating,—or to buy them if they should be offered for sale,—on the same terms that anyone else might offer.

These circumstances are to be taken into consideration in interpreting the 1933 assignment, in arriving at the intention of the parties in executing it; as is directed by Section 1233 to 1241, inclusive, of the Civil Code of Puerto Rico (Appendix I, *infra*, pp. 34, *supra*).

Point III

And the Court erred again, equally, in ignoring the plain fact that, necessarily, if the 1933 assignment were actually

to be regarded as transferring this option right to the Jose Tous Soto Heirs, then it became and remained their property, and was such in 1937; and they were entitled to the notice under it.

A. The option was certainly not extinguished by the transfer. If it were to be considered as the property of the heirs, then they stood in the partnership's shoes in respect to it. Then they held the same right, and were entitled to the same thirty days notice of any proposed sale or lease, to which the Mercado partnership would have been, if the assignment had never been made. And moreover, since the partnership, on the face of the record, still retained, in any event, an aliquot part of the mortgage indebtedness [its ¾ of 1% per annum interest], it follows that it likewise still retained, *even on that theory,* the right to the thirty days' notice of any proposed sale or lease, and to receive that notice either directly or else through the heirs as the owners of the major portion of the indebtedness.

B. *And those facts, at least,* and in any event, *all of the parties to these proceedings,*—and the whole world,—*were bound to know,* from the face of the record in the Public Registry,—even if they should choose to close their ears and eyes to their actual knowledge which the Court finds they all really had, of the true intention of both parties to the assignment, to the contrary.

C. But no notice whatever of the proposed sale and lease of March 9, 1937, was given to the Jose Tous Soto Heirs, any more than to the Mercado partnership. Of course, if it had been, it promptly would have been transmitted by the heirs to the partnership, this petitioner; and the jig would have been up.

The heirs were just as carefully kept in the dark as was the partnership.

Point IV

And the Supreme Court of Puerto Rico similarly erred in approving and affirming the judgment and the opinion

of the District Court; and in holding that the [*supposed*] lack of notice of record of the fact of the reservation of the option, and of its continued ownership by the Mercado partnership,

> "entitled defendants to proceed as regards the plaintiff in accordance with their construction of the statute" (R. 487, *supra*),

despite the express finding of the District Court, quoted with approval by the insular Supreme Court itself (R. 481-482), that all of the defendants-respondents *actually did have full notice of that fact.*

B. Under those circumstances, *what possible additional benefit could the defendants have received from having that same fact spread of record in the Public Registry,—the same thing which they already actually really knew* themselves, *as the court itself had just found* in approving the "Findings of Fact" of the District Court. And yet, the insular Supreme Court holds (R. 487 *supra*):

> "If the plaintiff when assigning its promissory notes to the Heirs of Tous Soto had expressly reserved to itself the right of option and *if when recording the assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them.* The record of the original contract in the registry and that of the second contract without any reservation in regard to option, entitled the defendants to proceed as regards the plaintiff in accordance with their construction of the statute." (*Italics supplied.*)

C. It is respectfully submitted that that holding is simply and plainly, "inescapably wrong"; "patently erroneous". It is gravely unjust; and should be reversed.

SECOND

Point V

Rule 39(b) of the Circuit Court of Appeals for the First

Circuit, quoted in the Petition (*ante*, p. 2), is invalid; and its application by that Court in this case, by dismissing the appeal from the Supreme Court of Puerto Rico, without giving appellant, this petitioner, an opportunity for a full hearing and argument, in the same way in which that court hears appeals within its jurisdiction coming from other courts, was a denial of due process of law and of the equal protection of the laws. This point has already been discussed in the Petition ("Petitioner's Position", *ante*, Petition, pp. 15-19).

CONCLUSION

The decision of the Supreme Court of Puerto Rico, affirming the judgment of the District Court of Ponce, was clearly wrong, and should be reversed; and the action or judgment or order of the Circuit Court of Appeals for the First Circuit, dismissing, under its Rule 39(b) the appeal to it, and affirming the judgment of the insular Supreme Court *pro forma*, without full hearing and argument, was likewise erroneous and a deprivation of petitioner-appellant's constitutional rights to due process of law and to the equal protection of the laws; and should likewise be reversed.

The writ of certiorari should be granted, and upon argument the judgments, as well of the Circuit Court of Appeals as also of the Supreme Court of Puerto Rico, and of the District Court of Ponce, should be reversed; and this case remanded with directions to grant the prayers of petitioner's original complaints in the District Court. Or else, in the alternative, the writ of mandamus should issue to the Circuit Court of Appeals [or that Court should be directed in these certiorari proceedings] to set aside its order or judgment of August 23, 1943, which affirmed *pro forma* without full hearing the judgment of the insular Supreme Court, and to proceed to hear upon full briefs and argu-

ment, and in the same way in which it hears appeals coming from other courts within its jurisdiction, and to consider and decide this case upon the merits.

Respectfully submitted,

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APPENDICES

APPENDIX I

Constitution and Statutes

CONSTITUTION

Article III. Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article IV. Section 3; Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;

Fifth Amendment. No person * * * * * * nor be deprived of life, liberty, or property, without due process of law.

FEDERAL

Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat., 951.

Sec. 2. That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property, without due process of law, or deny to any person therein, the equal protection of the laws.

Judicial Code, Sec. 128(a). The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts * * * * *

Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000.00, and in all habeas corpus proceedings. (As amended by Act of February 13, 1925, c. 229, 43 Stat. 936.)

PUERTO RICO

Civil Code. (Edition of 1930.)

Sec. 1233. If the terms of a contract are clear and leave

no doubt as to the intentions of the contracting parties the literal sense of its stipulations shall be observed.

If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail.

Sec. 1234. In order to judge as to the intention of the contracting parties, attention must principally be paid to their acts, contemporaneous and subsequent to the contract.

Sec. 1235. However general the terms of the contract may be, there should not be understood as admitted therein things and cases different from those with regard to which the persons interested intended to contract.

Sec. 1236. If any stipulation of a contract should admit of different meanings, it should be understood in the sense most suitable to give it effect.

Sec. 1237. The stipulations of a contract should be interpreted in relation to one another, giving to those that are doubtful the meaning which may appear from the consideration of all of them together.

Sec. 1238. Words which may have different meanings shall be understood in that which may be most in accordance with the nature and objects of the contract.

Sec. 1239. The uses or customs of the country shall be taken into consideration in interpreting ambiguity in contracts, supplying in the same the omission of stipulations which are usually included.

Sec. 1240. The interpretation of obscure stipulations of a contract must not favor the party occasioning the obscurity.

Sec. 1241. When it should be absolutely impossible to decide the doubts by the rules established in the preceding sections, if they deal with incidental circumstances of the contract, and said contract involves a good consideration, they shall be decided in favor of the smallest transmission of rights and interest. Should the contract involve a valuable consideration, the doubt shall be decided in favor of the greatest reciprocity of interests.

Should the doubts, the decision of which is referred to in this section, involve the principal object of the contract so

that the intention or will of the contracting parties can not be ascertained, the contract shall be void.

Sec. 1418. The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge, or privilege.

Sec. 1759. The pledge and the mortgage are indivisible, even if the debt should be divided among the legal representatives of the debtor or of the creditor.

Therefore, an heir of the debtor who may have paid a part of the debt can not request that the pledge or mortgage be proportionally extinguished as long as the debt has not been paid in full.

Neither can the heir of the creditor, who received his part of the debt, return the pledge nor cancel the mortgage to the prejudice of the other heirs who have not been paid.

From these provisions is excepted the case in which there are several things given in mortgage or pledge and each of them secures only a specified part of the credit.

The debtor in such case shall be entitled to have the pledge or mortgage extinguished in proportion as he pays the part of the debt for which each thing is specially liable.

MORTGAGE LAW

Section 152. A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry. The debtor shall not be bound by said contracts to any further extent than he was by his own.

The assignee shall be subrogated to all the rights of the assignor.

Sec. 153. In a mortgage constituted to secure obligations transferrable by endorsement or documents payable to bearer, when the mortgage interest is conveyed or assigned, it shall be understood that the latter is conveyed, together with the obligation or document, without the necessity of the debtor being advised thereof, or the transfer being recorded in the registry.

Law of Evidence (Rev. Stats. and Codes of 1911; Pars. 1394-1396).

Sec. 26 (Par. 1394). In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been ommitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible to be adopted as will give effect to all.

Sec. 27 (Par. 1395). In the construction of a statute, the intention of the Legislature, and in the construction of an instrument, the intention of the parties, is to be pursued, if possible; and when the intention of a general provision and that of a particular one are inconsistent, the latter is paramount to the former.

Sec. 28 (Par. 1396). For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

APPENDIX II

Chronological Analysis of the Facts

The underlying facts are substantially as follows:

1. On March 23, 1932, respondent, Mrs. Elvira Olivieri Commins, a divorcee, borrowed $41,256.89 from this petitioner, Mario Mercado e Hijos, "an agricultural civil partnership" of Ponce, for which she executed four promissory notes, each dated that day, and payable March 23, 1939, seven years after their date, "to the holder by endorsement of this promissory note" (Complaint, R. 2-3; "Exhibit J", R. 322, 324-325.) As security for the loan she executed "a voluntary mortgage", "to secure all and each of the promissory notes" (R. 2-4; 325-326), upon her undivided one-half interest in two estates then owned jointly by herself and her sister Santia, and known as "Los Indios" and "Juanita".

2. At that time, both of those estates were under ten-year leases to this petitioner partnership, Mario Mercado e Hijos, made back in 1927 and in 1928, respectively; and this petitioner also owned other lands of its own adjoining them,—its "Rufina" plantation ("Central Rufina"), and others, as is indicated by the recorded descriptions of the boundaries of the estates, "Los Indios" and "Juanita" ("Exhibit J", *supra;* R. 322-323).

3. Under those circumstances, there were inserted, in the same public deed by which the mortgage was constituted, two *independent clauses* running specifically,[1] person-

---

[1] UNLIKE THE GENERAL CLAUSE "*second*", constituting the mortgage, and which made to run, not to this petitioner by name, nor to anyone else in particular; but, generally, "to secure all and each of the promissory notes referred to in the foregoing clause" [notes payable to the "holder by indorsement", whoever he might be, without naming any specific payee]—in whomsoever's hands they might be,—without specifically naming any mortgagee.

ally, to this petitioner-plaintiff partnership, Mario Mercado e Hijos, by name, and reading, respectively, as follows:

"Seventh

"Option to Purchase and Sell and to Lease:—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates 'Indios' and 'Juanita' upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee." (R. 4-5, 327)

"Eleventh

"The parties likewise agree that the actual partition of said estates cannot be carried out without the consent of Mario Mercado e Hijos so long as the mortgage herein constituted is in force." (R. 5, 328)

4. The next year, on May 9, 1933 [while its ten-year leases of the lands were still in effect], by public deed, the petitioner partnership assigned the mortgage credits of $41,256.89 to the heirs of Jose Tous Soto, deceased, "through the proper endorsement and delivery by the plaintiff to the aforesaid heirs of the four mortgage credits" (Complaint, R. 5). *But the deed* of *"Assignment of Mortgage Credit"*, put in evidence by the respondents themselves,[2] recorded in the Public Registry on May 26,

[2] Defendants' "Exhibit 2" (R. 397-412).

1933 (R. 411-412), *shows on its face that this assignment* of the mortgage credits *was not an outright assignment of the whole deed by which the mortgage* securing the notes, in whosoever's hands they might be, *was constituted;* but was an assignment only of a *partial interest* in the promissory notes, for which purpose, only, the notes were delivered to the purchasers, the heirs of Jose Tous Soto. Pertinent provisions in the deed of assignment are:

(a) This petitioner-plaintiff partnership, the assignor, is, expressly,

> "to *retain* ¾ of 1% annually of the aforesaid interest during the life of this mortgage, as a consideration, as above stated, of the obligation to be assumed in the next clause of this deed." (Clause "THIRD", R. 406-407; *italics supplied.*)

(b) Clause "FOURTH" provides (R. 407) that:

> "The partnership Mario Mercado e Hijos binds itself to pay to the assignees in *monthly installments* at the end of each month the interest on the mortgage hereby assigned at the rate of 8¼% annually." (*Italics supplied. That is to say, monthly payments* at the rate of 8¼% per annum; *instead of the semi-annual payments* at the rate of 9% per annum stipulated in the promissory notes themselves. *Confer* R. 325, 401).

(c) The petitioner partnership Mario Mercado e Hijos, also *absolutely guarantees* (Clauses "Fifth", "Sixth" and "Eighth"; R. 407-408), not only the payment of the monthly installments, but also of the principal and interest of the mortgage debt in full, and also of all taxes, excises or imposts that might be levied on the principal or the interest by either the Federal or the Insular Government or any Municipality.

(d) *There is no express assignment of the rights given directly to the partnership* Mario Mercado e Hijos *by*

clauses "Seventh" and "Eleventh", above quoted, of the original mortgage deed of Mrs. Commins of March 23, 1943, *supra*,—the clauses securing the partnership's right or option to purchase or lease the lands at the same figure that might be offered by anybody else, and forbidding their partition between the two sisters without its consent.

(e) Nor was there, on the face of the document, any express outright assignment of the deed of mortgage itself, but only (Clause "First", R. 406) of "the mortgage credit constituted by the deed";—"the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act and in my presence and that of the witnesses *the four mortgage promissory notes* above mentioned duly endorsed." (*Italics supplied*).

5. In other words, upon the face of that deed of assignment, May 9, 1933, as it appears recorded on the Public Registry a few days later, May 26, 1933, *supra*, it apparently contemplated that this partnership, the assignor, holding the leases on these lands, as it then did, should continue to collect the interest from the mortgagor, at the stipulated rate of 9%, *in her semi-annual payments* as they fell due; but that, without regard to the dates of those semi-annual payments, *the partnership* should, *in monthly payments*, which it absolutely guaranteed—[and guaranteed, also, against any diminution through taxes, federal or insular],—provide a monthly income for the heirs of Jose Tous Soto, at the rate of 8¼% per annum on the amounts of the original mortgage notes; and that it should itself "*retain ¾ of 1%*" per annum, "*as a consideration*, as above stated, *of the obligation*" (R. 407 *supra*) thus assumed by the partnership.

This apparently means that the partnership still *retained* a live, *active interest in the whole deed* securing the notes. It retained the *right and the duty to collect the interest, semi-annually*, from the mortgagor, and to pay it over to the assignees *in the monthly installments at a lesser rate, which it absolutely guaranteed;* and the express right, "as

a consideration" for all these obligations it was thus assuming, *"to retain"* for itself the difference of ¾ of 1% in the annual interest.

And thus retaining this active interest, *no outright assignment* was made of the whole original mortgage deed; —and no assignment of the partnership's rights in the lands under clauses "Seventh" and "Eleventh" of that original deed.

6. *That such was the understanding in fact,*—and specifically that the option rights under clause "Seventh" of the March 23, 1932, mortgage, remained in the hands of the partnership and were not assigned,—*was directly and positively stated by the Heirs of Jose Tous Soto themselves,* in a formal deed of "ratification", March 31, 1937 (petitioner, plaintiff's "Exhibit E", R. 281-286; and "Exhibit F", R. 286-302), as soon as the question was brought to their attention, in which the heirs formally stated with reference to that assignment of May 9, 1933 (R. 288-289) that it did not carry with it the partnership rights under clause "Seventh" of the 1932 mortgage, but that, directly to the contrary (R. 284):

> "Fourth,—It is set down by the parties hereto • • • that the conveyance of the Mortgage Credit constituted by Mrs. Elvira Olivieri Commins by means of deed No. 13, of March 23, 1932, • • • had for its exclusive aim the reception by the Heirs of Jose Tous Soto, parties hereto, of a fixed and certain rent, it being agreed that the said partnership Mario Mercado e Hijos would retain three-fourths of 1% of the interest agreed upon in the said deed of constitution of mortgage.
>
> "It was likewise agreed between the parties, in consideration of the solidary obligation assumed by the partnership Mario Mercado e Hijos; that such conveyance would not carry with it, and did not so carry, the right or rights constituted in favor of the said partnership Mario Mercado e Hijos in clause "Seventh" above transcribed of said deed of constitution of mortgage, said partnership reserving to itself, as it did reserve, the rights and obligation arising from said

clause during all the time that the said mortgage might be in force."

This "ratification" deed of the Heirs was formally ratified on behalf of one of them, a minor, and another one, of age but "incapacitated", by the District Court of Ponce, in guardianship proceedings, by an order April 7, 1937, after hearing evidence and a report of the District Attorney (Plaintiff's "Exhibit F", *supra;* R. 286-302).

6. Three years after such assignment of the "mortgage credits" to the Jose Tous Soto heirs, Mrs. Commins and her sister partitioned the estates "Los Indios" and "Juanita" between themselves by a formal deed of partition dated August 20, 1936 (Complaint R. 5-8; plaintiff's "Exhibit A" R. 225-259), recorded in the public Registry on March 1, 1937 (R. 257-259); and in that partition deed *it was the partnership Mario Mercado e Hijos,—[and not the Heirs of Jose Tous Soto, nor anyone on their behalf],—who appeared and gave their consent to the partition* under *paragraph "Eleventh" of the 1932 mortgage.* (Complaint, Par. 10, R. 8; and *express admissions* in the "Answers" of defendants-respondents; Answer, Par. "Tenth," R. 22; Answer, Par. "Sixth," R. 27). See also the District Court's finding to that effect ("Opinion", R. 38).

7. The District Court expressly finds ("Opinion"; "Findings of Fact", at p. 39) that:

> "It also appears to have been shown that both Elvira Olivieri Commins *and all the other defendants* in cases Nos. 311 and 312 were *advised, prior to the execution of the contract of sale and lease,* of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios".

8. Under these circumstances, on December 15, 1936, some two years and three months prior to the maturity of the seven-year mortgage notes given by her on March 23,

1932[4], Mrs. Commins, by letter to Mr. Mario Mercado, the managing director[5] of the petitioner-plaintiff partnership, said (R. 373-374);

> "My dear friend: In accordance with the conversation had by my son-in-law, Mr. Rafael Barletta, with the manager, Mr. Peralta, regarding" [*other matters not pertinent in this case*] * * *. "As soon as these holidays are over Don Rafael is going to talk business with you.

At that time the partnership was still the tenant of both estates as lessee under the old ten-year leases of 1927 and 1928 respectively; and, as above noted, the mortgage notes of 1932 still had considerably more than two years yet to run before their maturity on March 22, 1939.

8. The District Court further finds, in its "Findings of Fact", *supra* (at p. 39), that:

> "From the testimony of Elvira Olivieri Commins (page 81 of the transcript of record) it appears as a fact that she authorized her son-in-law Rafael Barletta to enter into negotiations with Mario Mercado e Hijos for the lease or sale of the estates Juanita and Indios.
>
> "From the testimony of Jose R. Peralta, manager of the plaintiff partnership (page 126 *et seq.* of the transcript of record) and from certain telegrams and letters mentioned in such testimony and which were admitted in evidence, it appears as a fact that from December, 1926, until May[6] 8, 1937, Rafael Barletta and the partnership Mario Mercado e Hijos held conversations and meetings in regard to the possible purchase and lease of the said immovables from Elvira Olivieri Commins to the plaintiff partnership".

9. In the meantime, apparently along sometime in Jan-

---

[4] Maturing March 23, 1939 (R. 324).

[5] R. 168.

[6] "*May*" is a clerical error. It should read "*March* 8". [*Confer* testimony: Peralta, R. 145-146; Zapater, R. 181-183.]

uary or early in February, 1937, Mrs. Commins had a talk with her friend, Mrs. Elena Passarell-de-Delgado, "widow of Lluberas" (R. 166), whose husband, who had been a candidate for the Mayoralty of Ponce, had died. She is the mother (R. 104) of the respondents, Manuel Francisco Lluberas Passarell and his sisters, including Mrs. Celia Lluberas Passarell, the wife of the respondent, Emilio Blasini Totti; and is, therefore, the mother-in-law of that respondent, who, in turn, is a nephew of Mrs. Commins.

Dona Elena appears to have offered her friend, Mrs. Commins, "Dona Elvira", $40,000.00 for the part of the *"Indios"* estate that had come to the latter in the partition with her sister, Santia,—to buy it for the benefit of Dona Elena's son, Manuel Francisco Lluberas, and his sisters, Dona Elena's other children; on condition, however, that Mrs. Commins, "Dona Elvira", would also lease the other estate, *"Juanita"*, to her own nephew, the respondent, Dr. Blasini, son-in-law of Dona Elena, whose wife, Celia, is one of Dona Elena's children.

As to this, Mrs. Commins herself said, when asked about it in the presence of a stenographer during the notarial act of making formal demand upon her for rescission of the sale and the lease, on April 6, 1937 (R. 164-167), shortly before this litigation was begun (*Stenographer's notes;* R. 381-383):

> "A. When Dona Elena offered me $40,000.00 for the 'Indios', she asked me to lease her the 'Juanita' estate, for the benefit of her daughters, all this as a special concession in the event that she should buy the property. I accepted because in my opinion it was a good business, * * *. I also had my attorney * * *
>
> "Q. Who is your attorney? A. Sabater. Always when necessary he advises us.
>
> "Q. Cannot you remember whether this contract of sale was executed a month prior to March 9, 1937? A. I don't remember whether it was a month or twenty days' . . . Well, I had already given my word. You know I am very honest and my word is always made good. In this I take after my father.

"Q. Then, when you sold the 'Indios' estate, was it on condition that you should lease the 'Juanita' estate? A. Yes, sir. The 'Juanita' estate. I had already given my word."

"Q. Could you tell us the name of that person? A. Oh! That is my secret. I don't want to mention names."

* * * * *

"Q. Could you tell us something further in connection with said deal? A. If you want to know the details of that deal, why don't you go to the Registry?

(At this moment Dona Elvira personally reads clause 7 of the Notarial Act of Demand.)

"Q. From that clause you can see that you were bound to notify the partnership Mario Mercado e Hijos in the event that you proceeded to sell said estate. A. Yes, indeed. I always preferred him * * *.

"Q. And you * * * ? Did you sell without notifying Mario Mercado regarding the proposition to purchase, as stipulated in this clause? A. Well, as I had been told that he was not interested in the property and in those days I had a bronchitis attack, I was in bed, and moreover, I had already given my word * * *.

"Q. Who told you that? To whom did you give your word? A. Oh, well! That is a secret * * *. I don't want to mention names. I was under obligation for the favor that I had received and I will not, for any worldly consideration, let anybody be injured who had done me a great favor."

"Q. But Dona Elvira if you had notified Don Mario regarding said proposal they would have bought the estate from you upon the same terms and conditions. A. I don't know. Rafael told me that he had gone to see Don Mario (Don Marito) and that the latter was rude to him, saying that he was not interested in the property and that he should go to till it, a thing of which I would not have thought Don Marito capable, because I always preferred them and I even used to say that I would always prefer him. When told about that, I made up my mind to sell the 'Indios' estate and I leased the Juanita estate as a special condition, otherwise they would not have bought. * * * * * The agreement was to sell one and to lease the other.

"Q. And you did not notify the partnership Mario

Mercado e Hijos in that respect? A. Well, as he did not want it, I could not tell him anything * * * * *.

"Q. * * * * *.

"Q. Can you not remember more or less when it was agreed to sell the property? A. I cannot tell you exactly; it seems to me that it was at the time of Delgado's death. Oh, yes, I remember! It was about that time."

11. Thereupon Mrs. Commins and the other respondents proceeded to carry out the sale and lease in accordance with Dona Elena's offer. On February 25, 1937, a formal mortgage (R. 303-310; "Exhibit G") was put of record by which Mrs. Commins mortgaged to the respondent Manuel Francisco Lluberas Passarell, both of the estates, "Indios" and "Juanita" for an expressed $45,000.00 indebtedness and $900.00 attorneys' fees and costs and disbursements, but provided ("distribution of liens"; R. 308) that all except $5500.00 of the indebtedness should be charged against the various parcels of "Indios", leaving only $5500.00 against "Juanita"; and constituted the mortgagee, Francisco Lluberas Passarell, as her "special attorney-in-fact" (R. 309), to pay off the 1932 mortgage, and to retain the full amount of the $45,000.00 in his hands for that purpose, and afterwards to account to her for the balance left after clearing off such encumbrance. The loan recited in this mortgage (R. 307) was *to run for only six months*, with interest at 8 per cent per annum.

12. That new mortgage having thus been made, Francisco Lluberas Passarell paid the Jose Tous Soto heirs the $41,256.89, the principal amount of the 1932 mortgage [*two years before its maturity*], together with interest for three months in advance, and received from them a deed "of cancellation of mortgage", on March 8, 1937 ("Exhibit I", R. 312-321).

13. It appears from the "Stenographic Notes" (R. 444-447) in the guardianship proceedings, March 2 to March 5, 1937 (R. 425-451, Defendants' "Exhibit 4"), had upon the

petition of the guardian of two of the Jose Tous Soto heirs for permission to cancel the 1932 mortgage, that:

(1) Neither the guardian nor the Court was advised of the right to three months' notice before payment of the principal before maturity, under paragraph "Ninth" of the 1932 mortgage (R. 327) [On the contrary, the guardian and the Court were specifically advised that the payment could be made by the mortgagor at any time by simply paying three months' interest in advance (R. 446); and also that (R. 446),

> "if such cancellation is not made *a suit would ensue* which would cause inconvenience and expenses to the incapacitated ones" (*Italics supplied*);

(2) Nor reminded that under the assignment to the heirs from this petitioner Mario Mercado e Hijos of May 9, 1933, *supra, a proportionate amount of the three months' advance interest being paid clearly belonged to this petitioner* [its 3/4 of 1%, out of the 9% interest rate which the mortgage bore, expressly reserved to this petitioner by the assignment deed (Clause "Third", *supra*, R. 406-407)], and that, therefore, this *petitioner was entitled*—[for that reason alone, if for no other]—*to notice* of the proposed payment and cancellation of the mortgage;

(3) Nor reminded in any way of the option then in existence, and surely then being held, either by the heirs or else by this petitioner, under Clause "Seventh" of the 1932 mortgage deed.

The heirs' consent thus to accept the money and to cancel the mortgage, without any notice to this petitioner, appears, indeed, particularly from the "Stenographic Notes", to have been pushed through somewhat under pressure of the threat that, as above quoted, "*if such cancellation is not made a suit would ensue*",—a threat *for which there was most plainly no possible basis whatever.*

13. That cancellation of the mortgage having thus been secured on March 8, 1937, without any notice to the plain-

tiff partnership, and purposely, as it may fairly be said, "behind its back",[7] the respondents proceeded to execute and to put on record the new sale and lease from Mrs. Commins.

14 Promptly on learning of it, this petitioner made a formal demand for rescission and to be subrogated under its option to the rights of the new purchasers of "Indios" and of the new lessee of "Juanita"; and the demand being refused, deposited the purchase money in the District Court, in the same amount that had been paid by the new purchasers and lessee,[8] and began the present suits.

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[7] *Confer* the District Court's finding (R. 39) that during all that time, from the preceding December, 1936, onwards, Mrs. Commins, through her son-in-law Barletta, had been actively in communication with the petitioner partnership, "held conversations and meetings in regard to the possible purchase and lease of the said immovables"; and Barletta's numerous letters and telegrams to petitioner during all that time, making appointments and then making excuses to break them ("Exhibits" N, 0-1, 0-2, 0-3, 0-4, 0-5, and P, Q, R, and S; R. 371-373), and also the uncontradicted testimony of the petitioner's manager, Mr. Peralta (R. 145), that as late as March 8, 1937, *the very day that the cancellation of the mortgage was dated and was being put of record*, he had a talk with Barletta in the very office of the attorney, Zapater; "and he told me that he had in mind to see me on that day or the next day. * * * * * That the business was good and that he thought he could close it that afternoon or on the next day in the morning. He told me this in the presence of attorney Zapater." (R. 145, *supra.*)

And this was, in effect, corroborated by attorney Zapater himself, in his testimony (R. 179-181).

[8] Notarial Act, formal demand, testimony of attorney Porrata as to serving it (R. 164-168, with "stenographic notes" of statements made by Mrs. Commins on that occasion ("Exhibit U", R. 381-384). It was on that occasion that Mrs. Commins made the admissions hereinbefore quoted. (R. 381-383; *ante*, pp. 44-46).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 497.

MARIO MERCADO E HIJOS, *Petitioner*,

v.

ELVIRA OLIVIERI COMMINS, ET AL., *Respondents*.

PETITIONER'S SUPPLEMENTAL BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 497.

MARIO MERCADO E HIJOS, *Petitioner*,

v.

ELVIRA OLIVIERI COMMINS, ET AL., *Respondents*.

PETITIONER'S SUPPLEMENTAL BRIEF.

Re-adoption of Petition for Certiorari and Supporting Brief.

Petitioner requests permission to readopt, for the purposes of the present brief for petitioner, its original Petition for Certiorari and Supporting Brief in this case, without reprinting, to be considered for all purposes as parts of this brief, together with the additional three points and the two additional appendices here following,—all together to stand as the Petitioner's Brief in this case.

Jurisdiction.

The basis of this Court's jurisdiction in this case is stated in the Supporting Brief (pp. 21-22).

Certiorari was granted by this Court on February 28, 1944 (R. 519), when this case was assigned for argument

immediately following No. 349, *De Castro* v. *Board of Commissioners of San Juan.*

POINT VI.

Personal Knowledge Supplies Lack of Record.

[*This Point is in supplement, particularly, to Points I and IV* (pp. 23-25, 28-29) *of our original Supporting Brief.*]

A. Both of the lower courts expressly found that all of the defendants-respondents actually had personal notice and knowledge of petitioner's option rights, and of all the essential facts in the case; of everything which could have been disclosed by the fullest and most specific conceivable public record (District Court, R. 39, 110, 111; Insular Supreme Court, R. 482. *Confer* Supporting Brief, pp. 10, 23-25, 29).

B. Under those circumstances the law is well settled that a party possessing such actual knowledge, or means of knowledge, cannot claim to be protected from the effects of his knowledge, as an innocent third party purchaser without notice, because of any lack or defect in the notice appearing in the public registry or other public land records.

C. This general rule of law appears to be just as well recognized, and as well settled, in the Spanish Civil Law, and in earlier decisions of the Puerto Rico Supreme Court itself, as it is in the common law jurisdictions.

It is not overborne by any provisions either of Section 1362 of the Civil Code or of Section 34 of the Mortgage Law, or by any other Sections either of the Civil Code or the Mortgage Law, or of any other of the Codes of Puerto Rico.

This has been expressly decided in earlier decisions of the Supreme Court of Puerto Rico itself. *Colon* v. *Colon*, 51 P. R. Rep. 95, 101-102; *Quintana* v. *Capital of Puerto Rico*, 51 P. R. Rep. 103, 107; *Pacheco* v. *Plazuela Sugar Co.*, 56 P. R. Rep. 473, 477, *et seq.*

D. In *Colon* v. *Colon, supra*, 51 P. R. Rep. 95, the insular Supreme Court said (pp. 101-102):

> "The evidence for defendants establishes a *prima facie* case as to the simulated character of the conveyance by Dona Maria Luisa Alvarez to Rafael Colon. It is a fair inference from the close family relationship and from other facts established by the evidence that Raul Colon was aware of the simulated character of the conveyance by his aunt to his father. If he had knowledge of this fact, he cannot take shelter behind the revision of section 34 of the Mortgage Law. If the conveyance by Dona Maria to her brother Rafael was a simulated conveyance, it was an absolute nullity. It would follow, of course, that the conveyance by Rafael to Raul was also an absolute nullity. *Gonzalez Rodriguez* v. *Fumero*, 38 P. R. R. 497; Judgment of the Supreme Court of Spain dated November 30, 1909; *German Savings and Loan Soc.* v. *De Lashmutt et al.*, 67 Fed. 399; 8 C. J. 1149 and *Del Rio* v. *Sastre*, 9 P. R. R. 174."

E. In *Quintana* v. *Capital of Puerto Rico, supra*, 51 P. R. Rep. 103, the insular Supreme Court had occasion to discuss quite at length (pp. 104-108) the effect of actual knowledge of the facts in case of failure of the record to show some essential fact in full, and (pp. 106-108) some differences of opinion among Spanish Commentators as to the "exact definition of a third person," and expresses its agreement with the view of BARRACHINA in his treatise on the Mortgage Law,—which it says is also that of the Supreme Court of Spain,—that:

> "The law does not only preclude from the status of a third person the notary and witnesses, given the natural interpretation of section 27, but it also comprehends all those who, whether or not they intervened, have knowledge of the cause of nullity."

F. In *Pacheco* v. *Plazuela Sugar Company, supra*, 56 P. R. Rep. 473, 477 *et seq.*, the insular Court, considering the question again, and after quoting (p. 477) from its own

earlier decision in *Colon* v. *Plazuela Sugar Co.*, 47 P. R. Rep. 827, 834, agreeing with the view of the Supreme Court of Spain, as appearing "to be just and reasonable," concludes (p. 480):

> "Francisco Pacheco was put upon inquiry by the existence of the Plazuela Sugar Company's railroad tracks on the land at the time of his purchase. He could not close his eyes to things that would strike the eye of the most casual observer, and thereafter successfully invoke the second paragraph of section 1362 of the Civil Code to defeat the Plazuela Sugar Company's title to the land on which its tracks were laid. No purchaser of land which has been previously sold, who is not also an innocent purchaser, can take shelter behind the letter of the law."

G. This rule is, of course, in accord with the general rule of the common law jurisdictions,—and indeed, as it is believed, of all enlightened systems of the law,—that, as it is summarized, for example, in the article on "*Vendor and Purchaser*" in CORPUS JURIS (66 Corp. Jur., pp. 1060, 1092, 1174-1175, 1183-1184, *et seq.*, citing many cases in the notes), the essential elements of a *bona fide* purchaser include absence of actual knowledge of the facts curing a defect of record in the title; and that subsequent purchasers with notice, actual or constructive, take subject to defects of which they have such actual notice or means of notice, even though they be purchasers for valuable consideration; that, for example, actual possession of real property is notice to the world of rights claimed in it; and that a purchaser with actual notice can never be considered in the light of an innocent third person or *bona fide* purchaser without notice because of a lack of appearance in the public record of notice of facts of which he actually possesses personal knowledge or the means of knowledge, to which he has no right to close his eyes.

H. This rule was recognized in England as far back as December 19, 1747, by LORD CHANCELLOR HARDWICKE, in *La*

Neve v. *La Neve*, 1 Vesey, Sr., 64, 66-67 (27 English Reports 893), holding under the Registry Act, 7 Queen Anne, chap. 20, that actual notice to the second wife's attorney of the prior un-registered settlement, in favor of the first [deceased] wife's children, subordinated to it the second wife's subsequently registered settlement.

POINT VII.

Notice and Knowledge. Spanish Authorities.

There are collected in Appendix II (*infra*, pp. 24 *et seq.*) photostatic copies of extracts [in the Spanish language] from Volume 29 of the *Enciclopédia Jurídica Española* on this subject.

Permission is requested hereafter, before the time set for the argument of this case, to file English translations, to be considered as part of this brief.

POINT VIII.

Invalidity of Rule 39(b) of the Circuit Court of Appeals for the First Circuit.

This Court's Rule as to the Respect to be Accorded to Decisions of Territorial Courts on Local Matters.

(1) There is appended, as Appendix I to this brief (*infra*, pp. 7-23) a memorandum of this Court's decisions enunciating the rule.

(2) This memorandum is a duplicate of the memorandum, "Appendix F" to the Brief for the petitioner in case No. 349 at the present term of this Court, *De Castro* v. *Board of Commissioners of San Juan*, which this Court, as above noted, has directed (R. 519) be assigned for argument immediately preceding the argument of this case.

CONCLUSION.

As indicated in the conclusion of the petitioner's original Supporting Brief, the decision of the Supreme Court of Puerto Rico, affirming the judgment of the District Court of Ponce, was clearly wrong, and should be reversed; and the action or judgment or order of the Circuit Court of Appeals for the First Circuit, dismissing, under its Rule 39(b), the appeal to it, and affirming the judgment of the insular Supreme Court *pro forma*, without full hearing and argument, was likewise erroneous, and was a deprivation of petitioner-appellant's constitutional rights to due process of law and to the equal protection of the laws, and should likewise be reversed; and this case should be remanded with directions to grant the prayers of petitioner's original complaints in the District Court.

Respectfully submitted,

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APPENDICES.

APPENDIX I.

Memorandum of the Decisions of United States Supreme Court enunciating Rule of the Respect to be accorded to Decisions of Territorial Courts upon Questions of local Territorial Law.

APPENDIX II.

Extracts from Enciclopédia Jurídica Española.

APPENDIX I.

Memorandum of Decisions of United States Supreme Court enunciating Rule of the Respect to be accorded to Decisions of Territorial Courts upon Questions of local Territorial Law.

Sweeney v. Lomme, 22 Wall. (89 U. S.) 208, 213.

MILLER J.; *Montana Territory;* December 21, 1874.

Suit on a replevin bond, originally given by plaintiffs in error, *Sweeney, et al.*, to a sheriff, for the benefit of Lomme, defendant in error, then an attaching creditor. This Court said (pp. 212-213):

> "The first error assigned and mainly relied on is, that the bond having been given to Roberts, the Sheriff, this action cannot be maintained by Lomme, the party for whose benefit it was really given.
>
> "The question has been decided differently by different State Courts under precisely the same Code of practice.
>
> "Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own Code of practice, we should, in this conflict of authority, adopt the ruling of the Supreme Court of Montana in the consideration of it."

Northern Pacific R. Co. v. Hambly, 154 U. S. 349, 361.

BROWN, J.; *Dakota Territory;* May 26, 1894.

Fellow servant case. Question whether members of track crew, and of train crew, are fellow servants. Decided both ways in different States.—Decided that they are, by the Supreme Court of Dakota. This Court, rather inclined also to that opinion, if it were to be treated as an independent question, yet says, with reference to the Dakota Court's decision:

> "While this construction, given by the Supreme Court of a Territory, is not obligatory upon this Court, it is certainly entitled to respectful consideration, and in a doubtful case might well be accepted as turning the scale in favor of the doctrine there announced."

Fox v. Haarstick, 156 U. S. 674, 678-679.

SHIRAS, J.; *Utah Territory;* March 4, 1895.

Judgment of Utah Supreme Court, affirming District Court judgment for damages, for refusal to assign shares of stock in a transportation company.

> "The record discloses the affirmative findings of the trial Court which, of themselves fully warrant the conclusion of law based upon them, that the plaintiff was entitled to recover. * * *
>
> "This was the conclusion reached by the Supreme Court of the Territory, * * *
>
> "It is true that this ruling of the Supreme Court of the Territory does not, even in a question of practice arising under the local law, preclude this Court from reviewing it, as would a decision of a State court in similar circumstances; *but unless a manifest error be disclosed, we should not feel disposed to disturb a decision of the Supreme Court of a Territory construing a local statute. So far from discovering manifest error, we concur with the Supreme Court of the Territory in their disposition of the question.*" (*Italics supplied.*)

Armijo v Armijo, 181 U. S. 558, 561.

PECKHAM J.; *New Mexico Territory,* May 15, 1901.

An accounting suit; the New Mexico Supreme Court had certified that it was unable to find the facts, "the appeal not having been perfected in such a manner as to bring them before that Court", which had "decided that in order to bring before it the facts", "it was necessary that a motion for a new trial should be made in the court below, and if such motion were not made the facts in the case were not brought before the appellate court".

MR. JUSTICE PECKHAM says (at p. 561):

> "This matter of practice in the courts of the Territory is based upon local statutes and procedure, and we are not disposed to review the decision of the Supreme Court in such case. *Sweeney* v. *Lomme,* 22 Wall. 208. Our jurisdiction to review judgments of Terri-

torial courts is found in the statute approved April 7, 1874, chapter 80, entitled 'An Act concerning the practice in Territorial courts, and appeals therefrom', 18 Stat. 27. * * *

"This statute constitutes our only right of review on appeals from the Territorial courts. *Apache County* v. *Barth*, 177 U. S. 538, 541; *Grayson* v. *Lynch*, 163 U. S. 468, 473."

"In the absence of any findings by the Supreme Court of the Territory, and also being without anything in the nature of a bill of exceptions, we have nothing on which to base a reversal of the judgment in this case. * * *

"The report of the referee authorized the judgment that was entered, and there is nothing whatever in the record to show that any error has been committed in the trial of the case."

Copper Queen Min. Co. v. Terr. Bd. Equalization of Arizona, 206 U. S. 474, 479.

HOLMES J.; *Arizona Territory;* May 27, 1907.

Question of interpretation of local Territorial tax valuation statute. Board had been sustained by Territorial Supreme Court. Company's contention for a different interpretation was that the statute had been taken from a Colorado statute which had been otherwise construed. Sustaining the Arizona Territorial Court's construction, MR. JUSTICE HOLMES said:

> *"On the other hand, while this Court cannot refuse to exercise its own judgment, it naturally will lean toward the interpretation of a local statute adopted by the local court"* (*citing Sweeney* v. *Lomme; Northern Pac. R. Co.* v. *Hambly;* and *Fox* v. *Haarstick*; supra).

Then, after discussing the question on its merits (p. 479-48), MR. JUSTICE HOLMES concludes (at p. 479):

> "As an original question the construction adopted by the" [Territorial] "Supreme Court appears to us at least as reasonable as the opposite one contended for,"

and then proceeds to discuss the question there further (pp. 479-482), and concludes (p. 428) by affirming the judgment of the Arizona Territorial Supreme Court.

Lewis v. Harrea, 208 U. S. 309, 314.

FULLER, Ch. J.; *Arizona Territory;* February 24, 1908.

Bank receiver's suit to set aside deed made by judgment debtor to his wife, and have the property subjected to payment of the bank's judgment. The deed was made before the indebtedness accrued to the bank; but was not acknowledged until after it had accrued. The Arizona Supreme Court, interpreting the local statute, held that the deed did not become effective as a conveyance, until it was acknowledged. This Court said (p. 314):

> "The construction of the statute by the local courts is of great, if not of controlling, weight." (*Citing Sweeney v. Lomme; Northern Pac. R. R. Co. v. Hambly;* and *Copper Queen Consolidated Mining Co. v. Territorial Bd. of Equalization of Arizona; supra.*)

English v. Arizona, 214 U. S. 359, 361.

MCKENNA, J.; *Arizona Territory;* June 1, 1909.

Tax collection case: District Court's judgment affirmed by Territorial Supreme Court. This court said:

> "The first contention is repeated here, and it invokes our construction of the statutes of the territory against that made by the Supreme Court. If there were doubt, we should certainly lean to the construction given by the Supreme Court". [Citing *Copper Queen* case, *supra*] "But we think there is no doubt".

[But then proceeding non-the-less to discuss the question involved there, on the merits; and to uphold (pp. 361-365) the Territorial Supreme Court.]

Santa Fe County v. New Mexico, ex rel. Coler, 215 U. S. 296, 305, 307.

McKenna, J.; *New Mexico;* December 20, 1909.

Special Tax case:

> "Unless in a case of manifest error, this court will not disturb a decision of the Supreme Court of a Territory construing a local statute". *ib* p. 307.

[This Court manifestly agreed, on the merits, with the Territorial Supreme Court; and proceeded to discuss that Court's decision *on the merits.*]

Albright v. Sandoval, 216 U. S. 331, 339.

McKenna, J.; *New Mexico Territory;* February 21, 1910.

Contest over fees of office of County Assessor; depending on incumbency of office; and upon interpretation of Territorial statute, as to whether residence in the County was a requisite to continuance in holding County office. [New County of Sandoval having been formed, within which Mr. Sandoval was residing, who had theretofore been elected County Assessor of the earlier larger County of Bernalillo, from which Sandoval County was split off]. The Territorial Supreme Court had held continued residence in the County not essential. This Court said (p. 339):

> "And that construction we are not disposed to disturb" (*Citing Fox* v. *Haarstick* and *English* v. *Arizona, supra.*)

Lewers & Cooke v. Atcherly, 222 U. S. 285, 294.

Holmes, J.: *Hawaii;* December 18, 1911.

Appeal from decree of Territorial Supreme Court, refusing registration of title to land devised through an oral will in 1844, reported to the King, as required by the local laws in those days, "and there is evidence that the King disapproved it, because of Kalakaua's youth"; and that

in 1849 the Land Commissioner adjudged the land to Kinimaki in fee simple. After detailing the history, including a decree, in 1858, in favor of Kalakaua, who afterwards became King, and after further dissension, MR. JUSTICE HOLMES says:

> "Acting on this rule, as to the application in practice, we see no sufficient reason for not following the local Court. The" [Territorial] "Supreme Court came to the conclusion that the * * * decree of 1858 was wrong.
>
> "On this point there is every reason for attributing great weight to the decision of the Court on the spot" (p. 294)

Treat v. Grand Canyon R. Co., 222 U. S. 448, 452.

HOLMES, J.; *Arizona Territory;* January 9, 1912.

Tax injunction suit, by railway. The Territorial Supreme Court had affirmed the decree of the District Court; holding the railway exempt under a local ten year tax exemption statute enacted to encourage railroad building, and holding the appellee company, purchaser at foreclosure, entitled to succeed to the exemption. This Court said:

> "No doubt a strong argument can be made and was made for a different view, * * *. But the considerations that prevailed are cogent and so obvious as not to need statement, * * *. The courts of the Territory have given to the railroad the rights that it claims, as against the tax authorities seeking to levy the tax. The only question is whether any sufficient reason appears for not following the construction given to the local statute by the Territorial court, when that construction is inherently reasonable, is at least the first to strike the mind, and is one that protects private rights. It is enough to answer that on the principle followed so far as may be by this Court, there is no such manifest error as to warrant us in reversing the decisions below." [*Citing Fox* v. *Haarstick*, and *English* v. *Arizona, supra*].

Ker v. Coudens, 223 U. S. 268, 279.

HOLMES, J.; *Philippine Islands;* February 19, 1912.

Question of ownership, under the Spanish Law of Accessions, of the shore, by accretion and alluvion; a vexed question.

MR. JUSTICE HOLMES says (at p. 275-276):

> "That the question is a vexed one is shown not only by the different views of Spanish commentators, but by the contrary provisions of modern Codes, and by the occasional intimations of the doctors of the Roman Law."

The Philippine Supreme Court had held (p. 275) that the title to the accretions remained in the Government.

MR. JUSTICE HOLMES, after a full discussion (at pp. 275-279) of Roman, Spanish, French, Italian, Mexican, Chilean, and Louisiana sources, concludes (at p. 279);

> "The court of first instance below refers to judgments of the Supreme Court of Spain that seem to look in the same direction. We have neither heard nor found anything on the other side that seems to us to approach the foregoing considerations in weight, *not to speak of the respect that we must feel for the concurrent opinion of both the Courts below upon a matter of local law with which they are accustomed to deal.*" (Italics supplied)

Clason v. Matko, 223 U. S. 646, 653.

MCKENNA, J.; *Arizona Territory;* March 11, 1912.

Action to quiet title to a mining claim: MR. JUSTICE MCKENNA says (pp. 652-653):

> "The construction of the Supreme Court of Section 3241 of the Revised Statutes of the Territory is attacked. That section required, before its amendment in 1907, that in case of a relocation of a claim * * *.
>
> "The contention is that this section, properly considered, applied only to 'abandoned property' and did not apply to forfeited property, * * *.

"Of course, there may be a distinction between the abandonment of a claim and its forfeiture, but the question does not turn upon the distinction only, but upon what the statute means, considering all of its words; and, considering them all, we think they show quite clearly that no distinction was intended. * * *.

"Even if we should concede that the statute is ambiguous, we should certainly lean to agreement with the Supreme Court of the Territory". (*Citing Fox* v. *Haarstick; Armijo* v. *Armijo; English* v. *Arizona; Santa Fe County* v. *ex rel, Coler* v. *New Mexico;* and *Albright* v. *Sandoval; supra.*)

Gray v. Taylor, 227 U. S. 51, 56-57.

HOLMES, J.; *New Mexico Territory;* January 20, 1913; *County seat fight.* Question, whether attempted change of County seat was void.

After disposing of some objections urged under the Organic Act of Congress, this Court says:

"However it may be as to the foregoing question, which arises under an Act of Congress, the other objections are of a kind as to which we have often intimated our strong leaning toward following the local courts, and therefore will not be discussed at length" (pp. 56-57).

[But none-the-less this Court does actually discuss them (pp. 57-58), and was apparently in accord with the conclusions of the Territorial Supreme Court.]

Cordova v. Folgueras, 227 U. S. 375, 378-379.

HOLMES, J.; *Puerto Rico;* February 24, 1913.

Filiation suit. MR. JUSTICE HOLMES says:

"It is objected that the Supreme Court of Spain has construed the fourth transitory provision otherwise * * *. The construction adopted in Porto Rico at least does no violence to the words of the statute; it concerns local affairs under a system with which the Court of the Island is called on constantly to deal, and

we are not prepared, as against the weight properly attributed to the local decisions, to say that it is wrong." (Citing *Gray* v. *Taylor, supra.*)

Phoenix R. Co. v. Landis, 231 U. S. 578, 579-580.

HUGHES, J.; *Arizona;* December 22, 1913.

Death Case. District Court's judgment affirmed by Territorial Supreme Court, holding that under a local statute the action was for the benefit of the estate, and that it was not necessary for the plaintiff, administrator, to allege or prove the existence of beneficiaries, or the amount of the damages suffered by them,—following its own earlier decisions, in which it had reviewed the history of the legislation.

MR. JUSTICE HUGHES says:

"This court has frequently stated that it is disposed to accept the construction which the Territorial Court has placed upon a local statute" [*Citing earlier cases, supra*]. "The applicable considerations gain in force where, as in this case, the construction of the statute deliberately established and followed, has been reaffirmed upon the eve of statehood; and we are of the opinion that the ruling of the Supreme Court of the Territory of Arizona should not be disturbed."

Santa Fe Central Ry. Co. v. Friday, 232 U. S. 694, 700.

HOLMES, J.; *New Mexico;* March 23, 1914.

Action for personal injuries. MR. JUSTICE HOLMES says (pp. 698-700):

"The only argument addressed to us is an attack upon the jurisdiction of the court that tried the case. * * *

"But it is said that the jurisdiction of these courts was to be 'as limited by law', that that means by Territorial legislation, and that a Territorial statute provided * * *. Thus, it is argued, exclusive jurisdiction of cases like the present was transferred to the County District Courts.

"But it has been held for many years, that the purpose and effect of these statutes was to give the Judges of the Supreme Court sitting in the County District Courts authority to hear cases arising under Territorial laws, * * *. *We should not decide against the local understanding as a matter of purely local concern unless we thought it clearly wrong,* instead of thinking it, as we do, plainly right." (*Citing Phoenix Ry. Co.* v. *Landis, supra.*) (*Italics supplied.*)

Nadal v. May, 233 U. S. 447, 545.

HOLMES, J.; *Puerto Rico;* April 20, 1914.

Error to the District Court of the United States for Puerto Rico. Suit by Rafael Martinez Nadal to establish his title to one-half interest in a plantation, "Carmen", as devisee of his aunt. Question of the effect, under Puerto Rico laws relating to conjugal partnership, of a conveyance by the aunt's husband to a third party. MR. JUSTICE HOLMES says (pp. 453-454):

"Both sides agree that the wife's assent to a conveyance by her husband was made necessary for the first time by section 1328 of the Civil Code of March 1, 1902. Unless that Code went into effect at its date it did not apply to the conveyance of June 2." (*Discussing the history of the enactment of the four Puerto Rican Codes of 1902.*) "It is impossible to know how many or how important tranactions may have taken place on the faith of these repeated solemn assurances, *and apart from the general unwillingness of this Court to overrule the local tribunals upon matters of purely local concern* (*Santa Fe Central Ry. Co. v. Friday,* 232 U. S. 694, 700), it is not too much to say that the decisions have become a rule of property, even if we did not think, as we do, that probably the Secretary's certificate expressed the legislative will." (*Italics supplied.*)

Diaz v. Gonzalez, 261 U. S. 102, 105-106.

HOLMES, J.; *Puerto Rico;* February 19, 1923.

Suit by respondents to establish nullity of a sale of their land while they were all minors. The Supreme Court of Puerto Rico upheld the sale, and ordered the complaint

dismissed (27 P. R. Rep. 364), but was reversed by the Circuit Court of Appeals (276 Fed. 108), following another decision made by it at the same term (*Agenjo* v. *Agenjo*, 276 Fed. 105). This Court granted *certiorari*, reversed the Circuit Court of Appeals, and affirmed the judgment of the insular Supreme Court.

The father of the respondents died in 1904, and the title to the land passed to his widow and children. The land lay in the judicial district of Humacao, in Puerto Rico. The widow obtained authority to make the sale from the District Court of another judicial district [San Juan], and the sale was made. MR. JUSTICE HOLMES said (p. 103): "This suit proceeds on the ground that only the Court of the judicial district where the land was situated had power to authorize the sale of the minors' interest in the land."

Analyzing and comparing various provisions of the Civil Code of Puerto Rico and those of the Code of Civil Procedure, and referring to earlier decisions of the insular Supreme Court, and to comments by the commentators Manresa and Scaevola, MR. JUSTICE HOLMES says (at p. 105):

> "We will not repeat the argument quoted from Manresa and Scaevola that jurisdiction is a matter of adjective law and that the general provisions with regard to it are not repealed by a repeal of the substantive law or change in the Civil Code. 26 P. R. 631, 632. We will do no more than note Manresa's conclusion that although it would be more prudent to apply to the Judge specially designated, any Judge having jurisdiction of this class of cases is made competent by the submission implied from invoking his action. The distinction taken seems to be similar to that which we take between jurisdiction and venue. *Martorell* v. *Ochoa*, 25 P. R. 707, 729. A mistake as to the latter is waived by submission, *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, and in the Porto Rican law an *ex-parte* application is an adequate submission. This is a perfectly intelligible view, and when we are assured by the Supreme Court that it long has been taken, 25 P. R. 729; 26 P. R. 634; interrupted only by a momen-

tary obstruction caused perhaps by accepting too broadly and absolutely an expression in *Garzot* v. *De Rubio,* 209 U. S. 283, 303, we see no reason for not taking it here. The fact alleged that this interpretation of the law has become a rule of property, 25 P. R. 730, is very important and is not weakened by there being only a small number of decisions on the point. If it has been accepted by the practices of the community it should not be disturbed except upon an unescapable conclusion that it is wrong."

Mr. Justice Holmes then follows this upon with his famous observation, so frequently quoted, that (pp. 105-106):

"This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *De Villanueva* v. *Villanueva,* 239 U. S. 293, 299. *Nadal* v. *May,* 233 U. S. 447, 454. This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. In this case a slight difference in the caution felt in dealing with the interest of minors (*Baerga* v. *Registrar of Humacao,* 29 P. R. 440, 442), and a slight change of emphasis in the reading of statutes, explain the divergence between the Supreme Court and the Circuit Court of Appeals. Our appellate jurisdiction is not given for the purpose of remodeling the Spanish American law according to common law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below."

Villanueva v. Villanueva, 239 U. S. 293, 298-299.

WHITE, C. J.; *Philippine Islands;* December 6, 1915.

Divorce and Partition of conjugal community property.

CHIEF JUSTICE WHITE, after stating the case, and the assignments of error, says (pp. 298-299).:

> "Under these conditions it is apparent that all the errors relied upon * * * in their essence only dispute the correctness of the facts found by both the Courts below and but challenge the accuracy of the principles of the local law which were applied to the facts for the purpose of deciding the cause. Under these circumstances * * * we content ourselves with saying that we are of the opinion, after examining and weighing them all, that they are without merit for the following reasons: (a) Because insofar as they dispute the concurrent findings of fact of both the courts below they entirely fail to give rise to that conviction of clear error which must be entertained in order to authorize a reversal of the findings, *Texas & Pacific Ry.* v. *Louisiana R. R. Commission,* 232 U. S. 338; *Gilson* v. *United States,* 234 U. S. 380, 383-384; and (b) *Because insofar as they challenge the correctness of the application which the courts made of the local law* to the facts in deciding the cause, *they are totally deficient in that persuasive strength which it is essential they should possess in order to produce the conviction that clear error was committed* by the court below, *and thus lead us to depart from the principles by which we follow and sustain the local law as applied by the court below unless we are constrained to the contrary by a sense of clear error committed".* (Citing *Ker* v. *Couden; Santa Fe Ry.* v. *Friday; and Nadal* v. *May; supra.*) (*Italics supplied.*)

Fernandez v. Ayllon y Ojeda, 266 U. S. 144, 146.

HOLMES, J.; *Puerto Rico;* November 17, 1924.

Suit to set aside sale of land in Puerto Rico formerly belonging to the respondents (plaintiffs), on the ground that the sale made by their testamentary tutor or guardian was void because his appointment had not been recorded in the registry, and no bond given nor oath taken by him

as required by law. The defendants, the petitioners in this Court, relied upon title by the ordinary prescription of ten years possession under a just title and in good faith. MR. JUSTICE HOLMES says (pp. 145-146):

> "The sale took place under an order of the local District Court having jurisdiction over the minors and over the tutor, but the Circuit Court of Appeals overruling the Supreme Court of Porto Rico held that this was not sufficient to constitute just title, * * *. (p. 145).
>
> "The decision of the Supreme Court of Porto Rico turned upon local statutes and local traditions. The caution to be used before overruling such decisions was emphasized in a recent case where the action of the Supreme Court was open to greater doubt than here. *Diaz* v. *Gonzalez*, 261 U. S. 102, 106. For here apart from the respect due to the local judgment its reasoning commands our assent" (p. 146).

This Court accordingly reversed the Circuit Court of Appeals and upheld the insular Supreme Court.

Matos v. Alonso Hermanos, 300 U. S. 429, 432.

McREYNOLDS, J.; *Puerto Rico;* March 29, 1937.

Action by a purchaser of cattle to have the sale annulled and to recover the purchase money, because the cattle, although apparently in good condition, were suffering from tuberculosis from which some died and because of which others were condemned and destroyed by the Health Department.

The Supreme Court of Puerto Rico in reversing the local District Court had held that the sale contract was not void but was voidable at the purchaser's election; that its legal effect and the remedy for its violation were within local Code provisions relating to "redhibitory contracts"; that a limitation of forty days applied; and "that Section 1397 does not exclude the transaction made in this case from the field of warranties".

The Circuit Court of Appeals held the contract of sale illegal—non-existent—as to the cows which had died or

been condemned; and to that extent reversed the judgment of the insular Supreme Court. A dissenting opinion, however, approved the Supreme Court's construction of the Code, and its judgment, in its entirety [81 F. (2d) 930, 934].

This Court said (p. 432):

> "Manifestly the solution of the controversy must turn upon the meaning and effect of the above quoted sections of the Civil Code—local law of Puerto Rico.
>
> "Considering the argument here, the divergent views below, the authorities cited, and 'recognizing the deference due to the understanding of local courts upon matters of purely local concern,' it becomes impossible for us to entertain 'a sense of clear error committed' by the Supreme Court. Following the view so often approved, we think the Circuit Court of Appeals should have accepted and affirmed the ruling there announced after much consideration. *Nadal* v. *May*, 33 U. S. 447, 454; *De Villanueva* v. *Villanueva*, 239 U. S. 293, 299; *Diaz* v. *Gonzalez*, 261 U. S. 102, 105.

Waialua Co. v. Christian, 305 U. S. 91, 109.

REED, J.; *Hawaii;* November 7, 1938.

Two cases concerning the validity of a lease, a contract of maintenance, and a deed conveying or assigning rights of an incompetent to an undivided interest in land in Hawaii. The Supreme Court of Hawaii set aside the deed, and refused to set aside the contract or lease. The Circuit Court of Appeals for the Ninth Circuit reversed (94 F. (2d) 806).

This Court, after stating the facts (pp. 94-103), the decision of the Supreme Court of Hawaii (pp. 103-105), that of the Circuit Court of Appeals (pp. 105-106), "*The Status of the Supreme Court of Hawaii*" (pp. 106-108), and discussing generally the matter of the "*Review of its Decisions*" (pp. 108-109), concludes (pp. 109-110):

> "While the 34th section of the Judiciary Act is not applicable to territories, the arguments of policy in favor of having the state courts declare the laws of the state are applicable to the question of whether or not

territorial courts should declare the law of the territories with the least possible interference. It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. • • •

"In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.

"*Decision of the Supreme Court of Hawaii.*—To adopt the legal principles applied by the territorial supreme court in these cases as rules of decision in that jurisdiction, or to construe instruments as it interpreted them, is not manifest error.

"What ever may be the better rule as to the voidableness of the transfer documents of an incompetent, it is not clearly wrong to select the one here chosen.

"The construction of the contract of maintenance by the territorial court of last resort is likewise defensible. The lower court, itself, said the assignment of rents due to the incompetent 'by virtue of being.... devidee under the will....during the term of the natural life of her' the incompetent (see note 5, *supra*), might mean 'that the ward assigned all rents including those to which she might be entitled under the lease to the company and any other lease.' The minority opinion reached this conclusion. Although on consideration of the entire contract the majority reached a different answer, the interpretation of the Supreme Court of Hawaii is not manifestly erroneous. Nor do we see any occasion to re-examine the interpretation that the deed of May 2, 1910 (the relevant portions of which are set out above, *ante*, p. 96), conveyed the rents, issues and profits, assigned to Mrs. Kentwell."

Accordingly this court reversed the decree of the Circuit Court of Appeals, and affirmed that of the Supreme Court of Hawaii.

Sancho Bonet, Treasurer of Puerto Rico, v. Yabucoa Sugar Co., 306 U. S. 505, 509-511.

BLACK, J.; *Puerto Rico;* March 27, 1939.

Sancho Bonet, Treasurer of Puerto Rico, v. Texas Co., 308 U. S. 463, 470-472.

DOUGLAS, J.; *Puerto Rico;* January 2, 1940.

People of Puerto Rico v. Rubert Hermanos, Inc., 315 U. S. 637, 646.

BYRNES, *J.; Puerto Rico;* March 16, 1942.

These three cases are commented upon in the body of this brief (Point I, *ante,* pp. 8-17). Accordingly no comments are made upon them here.

ENCICLOPEDIA JURÍDICA ESPAÑOLA

COMPRENDE:

...ación de todas las voces y locuciones de uso en el tecnicismo científico-jurídico y en la legislación de España; los aforismos y principios generales del Derecho;

...ación razonada de las instituciones y disposiciones del Derecho en sus diversos ramos: Administrativo, Canónico, Civil (común y foral), Internacional (privado y público), Mercantil, ...ar (de Guerra y Marina), Penal, Político, Procesal, Social, etc.; el Derecho Consuetudinario y las costumbres jurídicas de observancia probada;

...o de los Códigos, Leyes, Reales Decretos, Reales Ordenes, Reglamentos, Circulares é Instrucciones de interés general, vigentes sobre cada materia hasta 31 de Diciembre de 1910;

...mo y ordenado repertorio de Jurisprudencia civil (común y foral), mercantil, penal, administrativa, hipotecaria y contencioso-administrativa, con recopilación de las doctrinas ...as por el Tribunal Supremo de Justicia, por la Presidencia del Consejo de Ministros en las decisiones ...competencias, recursos de queja y conflictos ministeriales, y por la Dirección General de los Registros y del Notariado, y

MINUCIOSOS ÍNDICES CRONOLÓGICOS Y ALFABÉTICOS

POR

Luis Moutón y Ocampo

...renzo M.ª Alier y Cassi, Enrique Oliver Rodríguez y Juan Torres Ballesté

ABOGADOS

CON LA COLABORACIÓN DE

EMINENTES JURISCONSULTOS, PROFESORES Y PUBLICISTAS

Publicación autorizada por R. O. de 4 de Junio de 1910

TOMO VIGESIMONOVENO

BARCELONA

No vamos á reproducir las alegaciones echas en defensa de esas críticas, ni á ntentar nueva definición. Bastará á nuestro ropósito examinar la aplicación que en la octrina y en la jurisprudencia se ha hecho e la idea de tercero, teniendo en cuenta, a la relación del art. 23 con el 27 y otros, a las dudas á que se prestan sus propios extos.

Intervención á que se refiere el art. 27.—Ya lo hemos dicho. Para la ley son terceros quienes no hayan intervenido en el acto ó contrato inscripto. A primera vista esta disposición parece clara, y por lo mismo poco expuesta á dudas. Las ha suscitado, sin embargo, y con razón.

¿Se entenderá que han intervenido el notario y los testigos? De los otorgantes, nada hay que decir: su intervención es evidente; de sus herederos tampoco, porque el sucesor es, para estos efectos jurídicos, la misma persona á quien suceden. El notario y los testigos intervienen en el acto ó contrato; mas la intervención, que no entraña reconocimiento ni pérdida de derechos, no debiera ser, á nuestro juicio, estimada, á los efectos del art. 27; sobre todo los testigos, en la realidad de las cosas, la mayor parte de las veces no prestan atención ni siquiera al fondo ó significación del acto ó contrato, mucho menos á los detalles. El sistema de la ley estriba no en ese solo artículo, sino en la armonía del conjunto formado por él y otros. Si según el artículo 23 los títulos inscribibles no perjudican á tercero si no están inscriptos, y según el 34, aunque conforme al 33 la inscripción no convalida los actos ó contratos que sean nulos con arreglo á las leyes, los que, no obstante, se ejecuten ú otorguen por persona que en el Registro aparezca con derecho para ello, no se invalidan, una vez inscriptos, en cuanto á los que con ella hubieran contratado por título oneroso, aunque después se anule ó resuelva el derecho del otorgante en virtud de título anterior no inscripto ó de causas que no consten claramente del mismo Registro; creemos sea consecuencia legalmente rigurosa de todo esto que un contratante, para proceder con seguridad y al amparo de la ley, cumple con ver el Registro y dar por no existente, al efecto de que no pueda venir luego en perjuicio suyo todo aquello que en el Registro no aparezca, constele ó no á él particularmente.

Fuerza es reconocer que este rigorismo legal podrá dar lugar á que á veces resulte triunfante la mala fe; pero también es cierto: 1.º, que eso suele ser efecto necesario é inevitable de todo sistema que haga consistir una garantía en procedimientos ó formalidades de carácter exterior; 2.º, que también será posible que extendiéndose el concepto de la intervención, por remediar una injusticia, se incurra en otra, dándose, por ejemplo, como enterado de un contrato á un testigo que ó no se penetró bien de su contenido, ó lo olvidó.

Personas á quienes, aun sin intervenir de modo alguno, se aplica el art. 27.—Como quiera que sea, el Tribunal Supremo se ha inclinado visiblemente á dar una grande amplitud á la aceptación de casos de intervención. Ha llegado á declarar (sents. de 21 de Abril de 1887 y 14 de Octubre de 1905) excluído de la consideración de tercero aun á aquel que, *si bien no intervino en el acto ó contrato*, tuvo de él conocimiento, ó por lo ostensible é indudable del derecho reclamado no puede alegar ignorancia del mismo.

Esa jurisprudencia se ha dado, indudablemente, para evitar que la mala fe utilice el arma que la ley pone á su disposición. Ese es su lado simpático: el reverso de la medalla está en el peligro de que se suponga que tuvo conocimiento de un hecho quien no lo conociera, y en la resistencia que, de mala fe á su vez, puedan oponer, dando lugar á pleitos, quienes, vencidos por la letra del texto legal, se acojan á su espíritu.

Por eso nunca será excesivo el cuidado y estudio de los Tribunales, si se persiste en esa jurisprudencia, para no tomar como

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Por eso nunca será excesivo el cuidado y estudio de los Tribunales, si se persiste en esa jurisprudencia, para no tomar como conocedor de un acto ó contrato á quienes no conste de un modo positivo é indudable que lo eran.

El Tribunal Supremo lo ha reconocido así (sentencia de 23 de Marzo de 1906), al declarar—haciendo implícitamente una muy justa y previsora recomendación á los Tribunales encargados de establecer los hechos, que él, al resolver los recursos, se ve forzado á aceptar, salvo una excepción que pocas veces se da—que la doctrina consignada en varias de sus sentencias, como las de 26 de Junio de 1905, 28 de Junio de 1897, 8 de Mayo de 1901 y 13 de Mayo y 30 de Agosto

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importa á todos los ciudadanos conocer, y quedando en la ley todo lo puramente reglamentario (organización de los Registros, etc.), aunque nosotros creemos que de hacerse esa reforma, en lo que se llevaría al Código debía incluirse lo referente á la hipoteca.

Martínez Pardos, defendiendo el proyecto de reforma, manifestó simpatías hacia esa aspiración; mas entendió que para su realización no había ambiente á la sazón, por lo que, siendo urgente la modificación de algunos puntos de la ley, era preferible realizar desde luego una modificación parcial y modesta, aplazándose para mejores circunstancias una reforma completa y radical.

No nos convencen las palabras de este culto diputado. Tendrían razón de ser tratándose de una reforma fundamental del régimen de la propiedad inmobiliaria; no á propósito de la separación de materias que proponía Portela. Para preparar ésta bastaban algunas sesiones de la Comisión de Códigos. En todo caso, la reforma del art. 27 y aun la aclaración del 23 hubiera podido hacerse con menor esfuerzo del que costaron algunas de las modificaciones de la ley.

de 1903, á tenor de las que no puede alegar su condición de tercero para oponerse á la nulidad de un derecho aquel que tiene perfecto conocimiento de las condiciones con que hubo de adquirirlo, *aun cuando éstas no resultasen del Registro*, exige y requiere por su naturaleza, en relación con el espíritu del art. 34 de la ley, *que semejante conocimiento se revele evidentemente*, ya por hechos que tienen que herir forzosamente los sentidos, cual acontece, por ejemplo, respecto de determinadas servidumbres aparentes, ya por actos que haya realizado el mismo supuesto tercero, pues sería disconforme con aquel terminante precepto la admisión de presunciones más ó menos lógicas y racionales, contradictorias, en realidad, de su esencial fundamento y alcance.

Fundado en ese prudente criterio, se ha declarado por el Tribunal Supremo no tenerse que reconocer por el adquirente de una finca servidumbres no inscriptas que no estén á la vista, como las de pastos, abrevaderos, etc., sin que por otra parte conste de un modo perfecto que de ellas tuviera conocimiento, ya que no bastan presunciones ni puede obligarse á quien va á efectuar una adquisición á que haga un estudio jurídico de las condiciones de los bienes objeto de ello.

Donde la jurisprudencia es copiosísima y bastante uniforme es al tratarse de las servidumbres continuas y aparentes (acueductos, desagües, luces, etc.), entendiéndose que por hallarse á la vista los signos de ellas no es necesario su inscripción para que el adquirente haya de sufrirlas, por más, observamos nosotros, que esos signos pueden ser recientes, debidos á tolerancia, etc.

No nos parece, en general, afortunada esa interpretación de la ley, aunque comciones de una misma fecha, relativas á una misma finca, se atenderá, según el art. 26, á la hora de la presentación, en el Registro, de los títulos respectivos.

He aquí la regla general. Hay una excepción importante (1); la prevista en el segundo párrafo del art. 23. La inscripción, se dice en él, de las fincas y derechos reales adquiridos por herencia ó legado, no surtirá efecto, en cuanto á tercero, hasta después de transcurridos dos años desde la fecha de la misma. Exceptúanse las inscripciones por título de herencia testada ó intestada, mejora ó legado á favor de herederos forzosos. Hay, por consiguiente, una excepción de la regla general y una excepción de la excepción.

Es este uno de los extremos en que la legislación española ha aparecido obediente á los criterios más contradictorios.

No se hallaba ese párrafo en la primitiva ley Hipotecaria. En la reforma de 1869 se agregó la excepción, por el temor, nada ilusorio ni quimérico, de que el derecho de un legítimo heredero quedara burlado sin que el reconocimiento que de él se hiciera por los Tribunales alcanzara eficacia, como había de suceder si los bienes habían sido ya inscriptos por otro heredero y enajenados á un tercero; á esa excepción se le asignó un plazo de duración de cinco años. Lo que hemos llamado excepción de la excepción se incorporó á la ley al reformarse nuevamente en 1877, volviéndose, al tratarse de herederos necesarios, al rigor del texto primero, por haberse entendido que respecto á los voluntarios no había peligro. Y últimamente, en la reforma de 1909 (2), los cinco años se han reducido á dos.

El artículo correspondiente de la ley anterior, decía que la inscripción *no perjudicará á tercero*, etc. La locución era tan

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Cuándo comienza el efecto de la inscripción.—Los arts. 25 y 28 de la ley lo dicen: en la fecha de la inscripción, que es la de la presentación, la cual deberá constar en la inscripción misma; en caso de cuestión sobre preferencia entre dos ó más inscripcripciones por título de herencia testada ó intestada, mejora ó legado á favor de herederos forzosos. Hay, por consiguiente, una excepción de la regla general y una excepción de la excepción.

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El artículo correspondiente de la ley anterior, decía que la inscripción *no perjudicará á tercero*, etc. La locución era tan

(1) Téngase también en cuenta lo dispuesto en el art. 14 de la ley de 5 de Agosto de 1873—que parece, dice Morell, respetarse en el art. 222 de la Hipotecaria—respecto á la suspensión de plazos cuando los libros del Registro han sido destruídos.

(2) En la discusión del proyecto en el Senado, el Conde de Torrenanas, apoyando una enmienda, sostuvo, en punto al legado, que si se trata del hecho á un legitimario, esto es, á un heredero forzoso (necesario, decía la ley anterior), el caso es igual que si no lo fuera, y el perjuicio á tercero no podrá serlo sino después de dos años, porque puede haber herederos que tengan mejor derecho. «En lugar del legado—añadió—me parecería mejor que se previera el caso, que no lo está, no cuando el usufructo es vitalicio, en el cual pudieran algunos entender que no estaba comprendida la palabra *heredero forzoso* el usufructo del cónyuge supérstite, necesita los dos años para que perjudique á tercero? Yo entiendo que no; yo entiendo que está en el caso de los herederos forzosos, de los herederos legitimarios, «pero no vendría mal que lo dijera la ley...»

Tormo opinó que con la fijación de una prescripción que no está en el Código civil, la de los dos años, se establecía una antinomia de las muchas que hay entre el Código y la ley Hipotecaria.

Alvarez Guijarro, en nombre de la Comisión, opuso al primero de los senadores la consideración de que la mención del legado no envolvía peligro y no debía omitirsela, porque teniendo que concurrir todos los herederos á la repartición de sus legítimas, habrán de aprobar las par-

que en el Registro aparezca como dueño ó con derecho para ello, una vez inscriptos, no se invalidan en perjuicio de tercero que contrató de buena fe, aun cuando el acto que produjo la inscripción sea posteriormente declarado nulo, con arreglo á las leyes.

Esta misma doctrina se halla confirmada por el art. 396 de la citada ley Hipotecaria, el 333 del reglamento para su aplicación y por la jurisprudencia.» (*Sent.* 21 Febrero 1870.)

No puede reconocerse el carácter de tercero á los que intervinieron en el acto ó contrato inscripto

«Habiendo sido parte la recurrente y otros acreedores en la escritura de convenio en que se estableció una hipoteca voluntaria que luego se inscribió en el Registro, no pueden ser considerados como terceros conforme al art. 27 de la ley Hipotecaria, puesto que intervinieron en ese contrato.» (*Sent.* 26 Enero 1881.—*Gac.* de la Sala 1.ª)

Los herederos del obligado, como continuadores de su personalidad, no tienen el concepto de tercero

(*Sent.* 27 Enero 1881.)

Para que la persona que no ha intervenido en el acto ó contrato inscripto pueda merecer el concepto de tercero, es preciso que el derecho real que trata de adquirir se encuentre inscripto á favor del que lo enajena.

D. Pedro Dalmau ejercitó la acción negatoria de servidumbre contra D. Ginés Ibran, para que éste declarase que determinadas fincas que el actor había adquirido de su hermano D. Jaime por escritura de compraventa, se hallaban libres del gravamen de servidumbre de paso que el demandado pretendía establecer sobre ellas. Este opuso á la demanda la excepción de cosa juzgada, y habiéndose dictado sentencia absolutoria en las dos instancias, el demandante interpuso recurso de casación fundándose en que no estaba inscripto en el Registro de la Propiedad la servidumbre de referencia.

El Tribunal Supremo declara **no haber lugar** al recurso:

«Según el art. 27 de la ley Hipotecaria, se considera como tercero aquel que no ha intervenido en el acto ó contrato inscripto y es menester, para que merezca aquel concepto, que el derecho real que trata de adquirir se halle inscripto á favor del que lo enajena.

Las fincas afectas á la servidumbre de que se trata, vendidas por don J. D. á su hermano don P. en 22 de Junio de 1876, no consta que se hubiesen inscripto á favor de aquél, y como éste funda su derecho en el título de compraventa de 1876, en virtud del cual, aunque se inscribieron como libres de gravamen las fincas compradas, no puede considerársele como tercero, y por lo tanto, esta inscripción no enerva el derecho de don G. I., declarado en la sentencia firme de 27 de Abril de 1877 recaída en el pleito seguido á instancia de doña T. T., causante de don J. D.

sentencia la doctrina de que la compraventa no transmite al comprador otros derechos que los que tiene el vendedor sobre la cosa enajenada:

«Considerando que la sentencia no infringe la doctrina invocada en el motivo expuesto, porque si bien al comprador no se transmiten más derechos que los que tiene el vendedor, debe esto entenderse sin perjuicio de los que se adquieren por terceros cuando los asientos del Registro les demuestra que la finca está libre de toda limitación, como sucedió en el caso presente, puesto que el contrato celebrado por la recurrente y en que no intervino D. Juan Lorenzo Ayala, no estaba ni podía estar inscripto por su carácter privado.» (*Sent.* 16 Noviembre 1883.—*Gac.* 21 Enero 1884.)

Efectos en cuanto á tercero, de la falta de inscripción de los gravámenes impuestos sobre la propiedad inmueble, y prescripción de los mismos cuando no constan inscriptos el título ó la posesión correspondientes.

«A tenor de los arts. 2.º, 13, 23, 25 y 27 de la ley Hipotecaria, los títulos en que se constituyan ó reconozcan derechos reales han de inscribirse en el Registro de la Propiedad, debiendo las servidumbres constar especialmente en las inscripciones del predio dominante y sirviente, sin cuyo requisito no perjudican á tercero, y la prescripción de tales derechos tampoco produce efecto en cuanto á tercero, según el art. 35 de la misma ley, si no están inscriptos el título ó la posesión correspondiente.

La sentencia que declara en perjuicio de los demandados que adquirieron libre de todo gravamen una finca, la existencia sobre parte de la misma servidumbre de arrancar céspedes para recomponer una presa que poseía el demandante, sin que conste en el Registro de la Propiedad este derecho ni la posesión de tal carga, infringe las disposiciones citadas de la ley Hipotecaria.» (*Sentencia* 23 Diciembre 1884.—*Gac.* 8 Agosto 1885.)

Concepto de tercero para los efectos de la eficacia de las inscripciones hechas en el Registro de la Propiedad.

Doña E. P. de G. adquirió una casa por escritura de compraventa, y don A. V. y otros entablaron demanda contra la misma á fin de que reconociese la existencia de tres censos que pesaban sobre la finca á favor de unas Capellanías, y se ordenase la inscripción de los gravámenes en el Registro de la Propiedad. Estimada la demanda, la señora demandada interpuso recurso de casación, por conceptuar infringidos los arts. 23, 25 y 27 de la ley Hipotecaria, toda vez que compró la casa como libre de toda carga, y las escrituras censuales no se hallaban inscriptas.

El Tribunal Supremo declara **no haber lugar** al recurso:

«Siendo uno de los principales fundamentos y objetos de la ley Hipotecaria el de la publicidad de las cargas ó gravámenes que afectan á la propiedad inmueble para que nadie sea responsable

... herederos del obligado, como continuadores de su personalidad, no tienen el concepto de tercero

(Sent. 27 Enero 1881.)

Para que la persona que no ha intervenido en el acto ó contrato inscripto pueda merecer el concepto de tercero, es preciso que el derecho real que trata de adquirir se encuentre inscripto á favor del que lo enajena.

D. Pedro Dalmau ejercitó la acción negatoria de servidumbre contra D. Ginés Ibran, para que éste declarase que determinadas fincas que el actor había adquirido de su hermano D. Jaime por escritura de compraventa, se hallaban libres del gravamen de servidumbre de paso que el demandado pretendía establecer sobre ellas. Este opuso á la demanda la excepción de cosa juzgada, y habiéndose dictado sentencia absolutoria en las dos instancias, el demandante interpuso recurso de casación fundándose en que no estaba inscripto en el Registro de la Propiedad la servidumbre de referencia.

El Tribunal Supremo declara **no haber lugar** al recurso:

«Según el art. 27 de la ley Hipotecaria, se considera como tercero aquel que no ha intervenido en el acto ó contrato inscripto y es menester, para que merezca aquel concepto, que el derecho real que trata de adquirir se halle inscripto á favor del que lo enajena.

Las fincas afectas á la servidumbre de que se trata, vendidas por don J. D. á su hermano don P. en 22 de Junio de 1876, no consta que se hubiesen inscripto á favor de aquél, y como éste funda su derecho en el título de compraventa de 1876, en virtud del cual, aunque se inscribieron como libres de gravamen las fincas compradas, no puede considerársele como tercero, y por lo tanto, esta inscripción no enerva el derecho de don G. I., declarado en la sentencia firme de 27 de Abril de 1877 recaída en el pleito seguido á instancia de doña T. T., causante de don J. D.

Además, el defecto de inscripción que se opone á dicha sentencia, aun en la hipótesis de que la hecha en virtud de la escritura de 1876 surtiese los efectos que se pretende, no podía tomarse en cuenta, porque el contrato de compraventa de que informa se celebró pendiente el pleito, que terminó en 1877, y aquel defecto se alegó antes de que se ejecutase la sentencia, y por consiguiente no había términos hábiles para que pudiera inscribirse.» *(Sent. 30 Abril 1881.—Gacs. de la Sala 1.ª, t. II.)*

Derechos del tercero que ha inscripto su título en el Registro de la Propiedad

Se declara **no haber lugar** al recurso de casación, interpuesto por el motivo de haber infringido la

«A tenor de los arts. 2.º, 13, 23, 25 y 27 de la ley Hipotecaria, los títulos en que se constituyan ó reconozcan derechos reales han de inscribirse en el Registro de la Propiedad, debiendo las servidumbres constar especialmente en las inscripciones del predio dominante y sirviente, sin cuyo requisito no perjudican á tercero, y la prescripción de tales derechos tampoco produce efecto en cuanto á tercero, según el art. 35 de la misma ley, si no están inscriptos el título ó la posesión correspondiente.

La sentencia que declara en perjuicio de los demandados que adquirieron libre de todo gravamen una finca, la existencia sobre parte de la misma servidumbre de arrancar céspedes para recomponer una presa que poseía el demandante, sin que conste en el Registro de la Propiedad este derecho ni la posesión de tal carga, infringe las disposiciones citadas de la ley Hipotecaria.» *(Sentencia 23 Diciembre 1884.—Gac. 8 Agosto 1885.)*

Concepto de tercero para los efectos de la eficacia de las inscripciones hechas en el Registro de la Propiedad.

Doña E. P. de G. adquirió una casa por escritura de compraventa, y don A. V. y otros entablaron demanda contra la misma á fin de que reconociese la existencia de tres censos que pesaban sobre la finca á favor de unas Capellanías, y se ordenase la inscripción de los gravámenes en el Registro de la Propiedad. Estimada la demanda, la señora demandada interpuso recurso de casación, por conceptuar infringidos los arts. 23, 25 y 27 de la ley Hipotecaria, toda vez que compró la casa como libre de toda carga, y las escrituras censuales no se hallaban inscriptas.

El Tribunal Supremo declara **no haber lugar** al recurso:

«Siendo uno de los principales fundamentos y objetos de la ley Hipotecaria el de la publicidad de las cargas ó gravámenes que afectan á la propiedad inmueble para que nadie sea responsable de los que ignore, es indudable que con arreglo á dicha ley no puede considerarse como tercero al que, si bien no intervino en el acto ó contrato inscripto, tuvo perfecto conocimiento al adquirir la finca por él poseída, de las cargas impuestas sobre ella, doctrina que está de acuerdo con los principios de Derecho, según los cuales no cabe impugnar aquello que se aceptó sin protesta ó que expresa ó tácitamente se consintió.

Doña E. P. de G., no sólo por las estipulaciones que contiene y por las repetidas referencias á los censos que se hace en la escritura de 8 de Enero de 1862, título de dominio de aquélla, sino porque conforme á la certificación del registrador de la Propiedad sobre la casa de la calle del Carmen, en parte de cuyo solar se ha construído la de la

recurrente, pesaba un censo de 132.000 reales de capital con réditos de 3 por 100 al año á favor de una capellanía, pudo enterarse y se enteró realmente de la existencia de esta hipoteca, por lo cual la sentencia recurrida al estimar la demanda de don A. V. y consortes, fundándose en que la doña E. no es tercero para los efectos de la ley Hipotecaria, no infringe los artículos de la misma y doctrina que se invocan en el primer motivo del recurso.» (*Sent.* 8 Octubre 1885.—*Gac.* 28 Enero 1886.)

Los arts. 36, 37 y 42 de la ley Hipotecaria se refieren exclusivamente á los terceros y el 34 contiene á favor de los adquirentes una garantía que no puede aprovecharles cuando se trata de una causa de nulidad ó rescisión de que tengan conocimiento, y que por tanto les afecta con arreglo á las leyes.

(*Sent.* 6 Mayo 1886.—*Gac.* 23 Junio.)

El precepto del art. 143 de la ley Hipotecaria, al declarar que la falta de nota al margen de la inscripción, cuando la obligación futura se haya contraído ó se cumpla la condición suspensiva, no puede aprovechar ni perjudicar á tercero; indica uno de los dos efectos que de esa falta pueden seguirse, pero no quiere decir que no pueda perjudicar ni favorecer al tercero, porque entonces no tendría efecto alguno, y no es esta la mente del legislador.

(*Sent.* 27 Junio 1887.—*Gac.* 19 Septiembre.)

La inscripción en el Registro de la Propiedad no es título de derecho por sí, sino corroboración y garantía de los que revisten tal solemnidad, que deben, por lo tanto, apreciarse cuando se trate de terceros, por su propia naturaleza y extensión y no por los términos más ó menos vagos del Registro.

(*Sent.* 11 Enero 1888.—*Gac.* 27 Abril.)

El art. 27 de la ley Hipotecaria sólo es aplicable tratándose de bienes ó derechos sujetos á inscripción.

«Con arreglo á lo dispuesto en el art. 396 de la ley Hipotecaria, para que no se admita en los Tribunales un documento ó escritura de que haya debido tomarse razón en el Registro y no se haya tomado, es necesario que se presente con objeto de perjudicar á tercero, carácter que para los efectos de dicha ley tiene, según establece el art. 27, la persona que no ha intervenido en el acto ó contrato inscripto.

Tanto por no poderse calificar de tercero á la ejecutante y demandada doña L. G. del P., puesto que no fué inscripta la escritura de cesión de 28 de Junio de 1865, base de la demanda de tercería, que se presentó con ella y que desde entonces viene unida á los autos, como por no haberse anotado el embargo del inmueble, ni aparecer inscripto su dominio á nombre del recurrente, si tratarse, en una, de derecho real alguno que conste en el Registro, es inaplicable la ley Hipotecaria á la cuestión litigiosa, la cual debe resolverse conforme á las prescripciones generales del Derecho.» (*Sent.* 21 [illegible] 1888.—*Gac.* 10 Julio.)

Cuando en el primero se entenderá sin perjuicio de la obligación de inscribir especialmente los referidos derechos, no quita á la simple mención los efectos contra tercero, pues no lo dice, y además, el artículo no tendría sentido y sería contradictorio.

(*Sent.* 22 Mayo 1889.—*Gac.* 28 Julio y 14 Agosto.)

Validez de la enajenación de una finca, en cuanto al tercero que la adquirió del comprador é inscribió su derecho en el Registro de la Propiedad.

«La cuestión capital del pleito, única que entraña una importancia decisiva, no es la de si el Ayuntamiento de Oviedo estaba ó no facultado para enajenar el rincón ó trozo de calle que vendió en 1825 á don F. P., sino la de si puede ó no invalidarse dicha venta en perjuicio de tercero que adquirió ese terreno por título oneroso é inscribió su derecho en el Registro.

En tal concepto, concurriendo como concurren en don R. V. todas las circunstancias que señala el art. 34 de la ley Hipotecaria, en que funda principalmente su demanda, toda vez que por escritura pública de 15 de Febrero de 1886, que fué inscripta en el Registro de la Propiedad, compró el terreno litigioso á doña M. del P. S. que aparecía en dicho Registro como dueña del mismo, la sentencia recurrida que se limita á reconocer y declarar su dominio y el derecho que le asiste para hacer en el expresado terreno las obras que le convengan, con sujeción á las Ordenanzas municipales, no infringe ni puede infringir, por no ser aplicables, las disposiciones legales invocadas en los tres primeros motivos del recurso (1).

Procede también desestimar el motivo 4.° porque el principio jurídico de que lo que es nulo desde su origen no puede convalecer por el transcurso del tiempo, no es ilimitado ó absoluto, y sólo debe entenderse aplicable, según tiene declarado este Tribunal Supremo, cuando la ley, dadas ciertas circunstancias, no reconoce ó crea un derecho que hay que respetar, como sucede en este caso.» (*Sentencia* 8 Noviembre 189[illegible].—*Gacs.* 9 y 10 Diciembre.)

Es nula la transmisión acordada por el Estado en concepto de censos desamortizables, de cargas de misas impuestas sobre los bienes inmuebles y zomstanas al Convenio-ley de 24 de Junio de 1867; por lo que el tercer adquirente de los gravámenes no puede ampararse en la inmunidad otorgada por el art. 34 de la ley Hipotecaria á quien ha inscripto su título.

Muchos años después de haber acordado la Delegación de Capellanías de Madrid, la redención de varios censos que pesaban sobre distintas fincas y que estaban afectos á la celebración de misas, el Estado los cedió á D. Isidro Sánchez, quien los transmitió á D. Enrique Royo y éste á su vez á D.ª Trinidad Casas, la cual inscribió la adquisición del censo consignativo, en el que fueron refundidos todos los expresados, en el Registro de la Propiedad. El delegado de Capellanías formuló demanda á fin de que se declarase nula y sin ningún valor ni efecto la referida inscripción, lo propio que la escritura [illegible] de la cual le fueron transmitidos

...ículos 30, 37 y 41 de la ley Hipotecaria se refieren exclusivamente á los terceros y el 34 contiene á favor de los adquirentes una garantía que no puede aprovecharles cuando se trata de una causa de nulidad ó rescisión de que tengan conocimiento, y que por tanto les afecta con arreglo á las leyes.

(*Sent.* 6 Mayo 1886.—*Gac.* 23 Junio.)

El precepto del art. 143 de la ley Hipotecaria, al declarar que la falta de nota al margen de la inscripción, cuando la obligación futura se haya contraído ó se cumpla la condición suspensiva, no puede aprovechar ni perjudicar á tercero; indica uno de los dos efectos que de esa falta pueden seguirse, pero no quiere decir que no pueda perjudicar ni favorecer al tercero, porque entonces no surtiría efecto alguno, y no es esta la mente del legislador.

(*Sent.* 27 Junio 1887.—*Gac.* 19 Septiembre.)

La inscripción en el Registro de la Propiedad no es título de derecho por sí, sino corroboración y garantía de los que revisten tal solemnidad, que deben, por lo tanto, apreciarse cuando se trate de terceros, por su propia naturaleza y extensión y no por los términos más ó menos vagos del Registro.

(*Sent.* 11 Enero 1888.—*Gac.* 27 Abril.)

El art. 27 de la ley Hipotecaria sólo es aplicable tratándose de bienes ó derechos sujetos á inscripción.

«Con arreglo á lo dispuesto en el art. 396 de la ley Hipotecaria, para que no se admita en los Tribunales un documento ó escritura de que haya debido tomarse razón en el Registro y no se haya tomado, es necesario que se presente con objeto de perjudicar á tercero, carácter que para los efectos de dicha ley tiene, según establece el art. 27, la persona que no ha intervenido en el acto ó contrato inscripto.

Tanto por no poderse calificar de tercero á la ejecutante y demandada doña L. G. del P., puesto que no fué inscripta la escritura de cesión de 28 de Junio de 1865, base de la demanda de tercería, que se presentó con ella y que desde entonces viene unida á los autos, como por no haberse anotado el embargo del inmueble, ni aparecer inscripto su dominio á nombre del recurrente, ni tratarse, en suma, de derecho real alguno que conste en el Registro, es inaplicable la ley Hipotecaria á la cuestión litigiosa, la cual debe resolverse conforme á las prescripciones generales del Derecho.» (*Sent.* 21 Abril 1888.—*Gac.* 22 Julio.)

No puede reputarse como tercero para los efectos de la ley Hipotecaria al que carece de título inscripto

(*Sent.* 20 Junio 1888.—*Gac.* 18 Octubre.)

El art. 29 de la ley Hipotecaria prescribe que surtirá efecto contra tercero el dominio ó cualquier derecho real que se mencione expresamente en las inscripciones ó anotaciones preventivas, aunque no esté consignado en el Registro, por medio de una inscripción separada y especial; y aunque en el párrafo 2.° del mismo artículo se añade que lo dicho en su derecho en el Registro de la Propiedad.

«La cuestión capital del pleito, única que entraña una importancia decisiva, no es la de si el Ayuntamiento de Oviedo estaba ó no facultado para enajenar el rincón ó troso de calle que vendió en 1825 á don F. P., sino la de si puede ó no invalidarse dicha renta en perjuicio de tercero que adquirió ese terreno por título oneroso é inscribió su derecho en el Registro.

En tal concepto, concurriendo como concurren en don R. V. todas las circunstancias que señala el art. 34 de la ley Hipotecaria, en que funda principalmente su demanda, toda vez que por escritura pública de 15 de Febrero de 1886, que fué inscripta en el Registro de la Propiedad, compró el terreno litigioso á doña M. del P. S. que aparecía en dicho Registro como dueña del mismo, la sentencia recurrida que se limita á reconocer y declarar su dominio y el derecho que le asiste para hacer en el expresado terreno las obras que le convengan, con sujeción á las Ordenanzas municipales, no infringe ni puede infringir, por no ser aplicables, las disposiciones legales invocadas en los tres primeros motivos del recurso (1).

Procede también desestimar el motivo 4.° porque el principio jurídico de que lo que es nulo desde su origen no puede convalecer por el transcurso del tiempo, no es ilimitado ó absoluto, y sólo debe entenderse aplicable, según tiene declarado este Tribunal Supremo, cuando la ley, dadas ciertas circunstancias, no reconoce ó crea un derecho que hay que respetar, como sucede en este caso.» (*Sentencia* 8 Noviembre 1890.—*Gacs.* 9 y 10 Diciembre.)

Es nula la transmisión acordada por el Estado en concepto de censos desamortizables, de cargas de misas impuestas sobre los bienes inmuebles y sometidas al Convenio-ley de 24 de Junio de 1867; por lo que el tercer adquirente de los gravámenes no puede ampararse en la inmunidad otorgada por el art. 34 de la ley Hipotecaria á quien ha inscripto su título.

Muchos años después de haber acordado la Delegación de Capellanías de Madrid, la redención de varios censos que pesaban sobre distintas fincas y que estaban afectos á la celebración de misas, el Estado los cedió á D. Isidro Sánchez, quien los transmitió á D. Enrique Royo y éste á su vez á D.ª Trinidad Casas, la cual inscribió la adquisición del censo consignativo, en el que fueron refundidos todos los expresados, en el Registro de la Propiedad. El delegado de Capellanías formuló demanda á fin de que se declarase nula y sin ningún valor ni efecto la referida inscripción, lo propio que la escritura por virtud de la cual le fueron transmitidos los censos.

Citado de evicción el Estado, su representante sostuvo la eficacia de las transmisiones, dictándose sentencia por la Audiencia declarando nula y sin ningún valor ni efecto la inscripción de los seis censos mencionados, así como la escritura de cesión de los mismos. Contra el fallo interpuso recurso de casación el abogado del Estado por reputar infringido: 1.° El art. 34 de la ley Hipotecaria; 2.°, el art. 1.° de la ley de 1.° de Mayo de 1855; 3.°, el

(1) Estos motivos se derivaban del supuesto de que el Ayuntamiento no pudo enajenar el terreno.

. 1.° de la ley de 27 de Febrero de 1856 y el 3.° la de 11 de Julio del mismo año; 4.°, los arts. 4.°, y 7.° del Convenio-ley de 4 de Abril de 1860; , los arts. 5.°, 7.° y 8.° del Convenio-ley de 24 Junio de 1867, y 6.°, la doctrina sustentada r el Tribunal Supremo en varias sentencias y principio de Derecho de que no puede pedir una a quien no tiene acción para ella.

El Tribunal Supremo declara **no haber lugar** al urso:

Considerando que el fallo recurrido no infringe rt. 34 de la ley Hipotecaria ni la doctrina citada el motivo 1.°, porque la nulidad de la escritura 7 de Junio de 1887 y su inscripción en 16 del mo á favor de D.ª Trinidad de las Casas y a no se funda en título posteriormente inscripto d Registro, sino en otro que lo estaba con mucha erioridad, ó sea la escritura de 23 de Septiembre 1847, de la que se tomó razón en 28 siguiente la antigua Contaduría de Hipotecas á favor de memorias de misas sobre los seis censos, que igual carácter y para los propios fines se refuaron en el consignativo constituído en dicha itura por el delegado del Tribunal de esta diócesi, sobre la casa de la calle de Mesón de Paredes, m. 59, de la pertenencia de D. Simeón Avalos:

Considerando que la redención de censos sobre nes afectos á cargas de carácter puramente esiástico no se rige por las leyes desvinculadoras 1855 y 1856, ni por el Convenio-ley de 4 de ril de 1860, sino que está sujeta al Convenio-ley 24 de Junio de 1867, que es la legislación vigente la materia, y por cuyo art. 8.° se confiere la reción de cargas eclesiásticas á la exclusiva competencia del diocesano; y en tal concepto, siendo censo consignativo de que se trata de la clase ies expresada, claro es que el Estado, que ningún presentante tenía en dicho censo, carecía en solutо de facultades para otorgar la escritura redención (1) de 18 de Enero de 1887 á favor de Isidro Sánchez Ruiz, así como éste para otorr la de 7 de Junio inmediato á favor de D.ª Trinidad de las Casas; y es claro, por consiguiente, e la Sala sentenciadora ha aplicado con el debido erto los arts. 5.°, 7.° y 8.° del mencionado Convey de 24 de Junio de 1867 y el 3.° de la Inscción del día siguiente, citados en el motivo 4.°, no ha infringido ni podido infringir las leyes y venio-ley invocados en los motivos 2.° y 3.°:

Considerando que tampoco se infringe en la sencia recurrida la doctrina legal alegada en el otivo 5.°, puesto que la acción de la Delegación Capellanías no nace de la validez ó nulidad la escritura é inscripción de 1887, sino que e su origen y se apoya en la escritura y toma de ión de 1847, y en las facultades que concede al cesano el Convenio-ley de 1867; y porque notiada la Delegación con arreglo al art. 34 de la Hipotecaria, á instancia de D.ª Trinidad de las s, era forzoso á la Delegación reclamar directe, dentro de los treinta días prefijados en ho artículo, contra la escritura é inscripción favor de la D.ª Trinidad, sin cuya reclamación rían quedado aquéllas convalidadas y subsistas, y caducado y perdido el derecho de la Deleción de Capellanías:

«No es aplicable el art. 33 de la ley Hipotecaria que se cita en el tercer motivo á las compras hechas por D. Juan Nachón, D. Elías Alvares y D. Manuel Mortera á D.ª Clara Menéndez Valdés, por hallarse comprendidas estas adquisiciones en una de las excepciones que al precepto general del citado art. 33 establece el art. 34 de la misma ley y en este concepto es procedente el recurso.

Infringe el art. 34 de la ley Hipotecaria la sentencia que anula las adquisiciones realizadas é inscriptas en el Registro de la Propiedad por don Juan Nachón, D. Elías Alvarez y D. Manuel Mortera, porque éstos compraron las fincas de que se trata á D.ª Clara Menéndez Valdés, que en el Registro aparecía con derecho para enajenarlas por haberle sido adjudicadas en la testamentaría que para pago de deudas y gastos se le formó en la partición de la herencia de su difunta madre doña Regina Bernardo Estrada, á favor de quien fueron inscriptas las fincas en 3, 4, 5 y 6 de Junio de 1884; y por lo mismo, aunque se resolviera ó anulara el derecho de la otorgante D.ª Clara Menéndez Valdés, en virtud de la escritura de fundación de las capellanías de Nuestra Señora de la Asunción, título anterior no inscripto, no por esto se invalidarían en cuanto á los terceros Nachón, Alvarez y Mortera, por lo cual la sentencia infringe respecto á estos tres recurrentes el citado art. 34, y no acerca de D. José Vázquez Suárez y D. Salvador Vázquez Faes, que no están en la excepción del citado artículo.» (*Sent.* 12 Junio 1894.—*Gacs.* 5 y 6 Noviembre.)

Si bien tiene declarado el Tribunal Supremo, que conforme á lo dispuesto en los arts. 2.°, 13, 23, 25 y 27 de la ley Hipotecaria, los títulos en que se constituyan ó reconozcan derechos reales han de inscribirse en el Registro de la Propiedad, debiendo las servidumbres constar especialmente en las inscripciones de los predios dominante y sirviente, sin cuyo requisito no perjudican á tercero; y la prescripción de tales derechos tampoco produce efecto en cuanto á tercero, según el art. 35 de la misma ley, si no están inscriptos el título ó la posesión correspondientes; es también doctrina repetidamente declarada en varias sentencias, que no puede considerarse como tercero para los efectos de dicha ley, al que, si no intervino en el acto ó contrato inscripto, tuvo conocimiento al adquirir la finca por el poseída de las cargas impuestas sobre ella, ya que uno de los principales fundamentos y objetos de la ley Hipotecaria es el de la publicidad de las cargas que afectan á la propiedad inmueble para que nadie sea responsable de las que ignore; y no cabe alegar ignorancia de aquello de que se tiene perfecto conocimiento.

(*Sent.* 11 Enero 1895.—*Gacs.* 31 Marzo y 14 Abril.)

La antigua hipoteca tácita á favor de la mujer por sus bienes dotales, no puede hacerse efectiva en bienes adjudicados para pago de deudas, vendidos en tal concepto sin estar sometidos á carga alguna según el Registro y adquiridos por terceras personas.

…r., porque la nulidad de la escritura …de Junio de 1887 y su inscripción en 16 del …mo á favor de D.ª Trinidad de las Casas y …a no se funda en título posteriormente inscripto …l Registro, sino en otro que lo estaba con mucha …rioridad, ó sea la escritura de 23 de Septiembre 1847, de la que se tomó razón en 28 siguiente …la antigua Contaduría de Hipotecas á favor de …memorias de misas sobre los seis censos, que …igual carácter y para los propios fines se refuan…os en el consignativo constituído en dicha …critura por el delegado del Tribunal de esta dió…sis, sobre la casa de la calle de Mesón de Paredes, …m. 59, de la pertenencia de D. Simeón Avalos:

Considerando que la redención de censos sobre …nes afectos á cargas de carácter puramente…clesiástico no se rige por las leyes desvinculadoras …1855 y 1856, ni por el Convenio-ley de 4 de …ril de 1860, sino que está sujeta al Convenio-ley …24 de Junio de 1867, que es la legislación vigente …la materia, y por cuyo art. 8.º se confiere la re…dención de cargas eclesiásticas á la exclusiva com…etencia del diocesano; y en tal concepto, siendo …censo consignativo de que se trata de la clase …les expresada, claro es que el Estado, que ningún …resentante tenía en dicho censo, carecía en …soluto de facultades para otorgar la escritura …redención (1) de 18 de Enero de 1887 á favor de …Isidro Sánchez Ruiz, así como éste para otor…r la de 7 de Junio inmediato á favor de D.ª Tri…idad de las Casas; y es claro, por consiguiente, …e la Sala sentenciadora ha aplicado con el debido …erto los arts. 5.º, 7.º y 8.º del mencionado Conve…io-ley de 24 de Junio de 1867 y el 3.º de la Ins…cción del día siguiente, citados en el motivo 4.º, …no ha infringido ni podido infringir las leyes y …venio-ley invocados en los motivos 2.º y 3.º:

Considerando que tampoco se infringe en la sen…cia recurrida la doctrina legal alegada en el …otivo 5.º, puesto que la acción de la Delegación …Capellanías no nace de la validez ó nulidad …la escritura é inscripción de 1887, sino que …e su origen y se apoya en la escritura y toma de …ón de 1847, y en las facultades que concede al …esano el Convenio-ley de 1867; y porque noti…ó la Delegación con arreglo al art. 34 de la …Hipotecaria, á instancia de D.ª Trinidad de las …as, era forzoso á la Delegación reclamar direc…ente, dentro de los treinta días prefijados en …o artículo, contra la escritura é inscripción …favor de la D.ª Trinidad, sin cuya reclamación …aran quedado aquéllas convalidadas y subsis…tes, y caducado y perdido el derecho de la Dele…ción de Capellanías:

Y considerando que, por lo que se deja expuesto, …cidente la acción con que litiga la referida …egación de Capellanías de esta diócesis y la …procedencia de la infracción que se alega en el …y último motivo.» *(Sent.* 18 Enero 1894.—*…*. 3 Marzo.)

…ringe el art. 34 de la ley Hipotecaria, la sentencia …e invalida las adquisiciones de bienes enajenados …los actuales poseedores por personas que los …enían inscriptos á su favor, y que á su vez los …scribieron á su nombre igualmente en el Re…istro de la Propiedad.

(1) Debe decir *transmisión*.

tera, porque éstos compraron las fincas de que se trata á D.ª Clara Menéndez Valdés, que en el Registro aparecía con derecho para enajenarlas por haberle sido adjudicadas en la hijuela que para pago de deudas y gastos se le formó en la partición de la herencia de su difunta madre doña Regina Bernardo Estrada, á favor de quien fueron inscriptas las fincas en 3, 4, 5 y 6 de Junio de 1884; y por lo mismo, aunque se resolviera ó anulara el derecho de la otorgante D.ª Clara Menéndez Valdés, en virtud de la escritura de fundación de las capellanías de Nuestra Señora de la Asunción, título anterior no inscripto, no por esto se invalidarían en cuanto á los terceros Nachón, Alvarez y Mortera, por lo cual la sentencia infringe respecto á estos tres recurrentes el citado art. 34, y no acerca de D. José Vázquez Suárez y D. Salvador Vázquez Facs, que no están en la excepción del citado artículo.» *(Sent.* 12 Junio 1894.—*Gacs.* 5 y 6 Noviembre.)

Si bien tiene declarado el Tribunal Supremo, que conforme á lo dispuesto en los arts. 2.º, 13, 23, 25 y 27 de la ley Hipotecaria, los títulos en que se constituyan ó reconozcan derechos reales han de inscribirse en el Registro de la Propiedad, debiendo las servidumbres constar especialmente en las inscripciones de los predios dominante y sirviente, sin cuyo requisito no perjudican á tercero; y la prescripción de tales derechos tampoco produce efecto en cuanto á tercero, según el art. 35 de la misma ley, si no están inscriptos el título ó la posesión correspondientes; es también doctrina repetidamente declarada en varias sentencias, que no puede considerarse como tercero para los efectos de dicha ley, al que, si no intervino en el acto ó contrato inscripto, tuvo conocimiento al adquirir la finca por él poseída de las cargas impuestas sobre ella, ya que uno de los principales fundamentos y objetos de la ley Hipotecaria es el de la publicidad de las cargas que afectan á la propiedad inmueble para que nadie sea responsable de las que ignore; y no cabe alegar ignorancia de aquello de que se tiene perfecto conocimiento.

(Sent. 11 Enero 1895.—*Gacs.* 31 Marzo y 14 Abril.)

La antigua hipoteca tácita á favor de la mujer por sus bienes dotales, no puede hacerse efectiva en bienes adjudicados para pago de deudas, vendidos en tal concepto sin estar sometidos á carga alguna según el Registro y adquiridos por terceras personas.

«Si bien por la ley de Partida que se cita como infringida (la 33, tít. XIII, Partida 5.ª) en el único motivo del recurso, tenían las mujeres casadas hipoteca tácita sobre los bienes del marido por sus aportaciones dotales en los términos que la misma prescribe, esta ley es inaplicable al caso actual; porque además de tratarse de una finca adjudicada á D. Manuel Ottega, padre de los recurrentes, para pago de deudas en la testamentaría de la madre de aquél, abuela de los últimos, exenta, por tanto, de dicha hipoteca tácita, ha sufrido dos transmisiones de dominio inscriptas en el Registro de la Propiedad, y estas inscripciones á favor de terceros adquirentes por título oneroso están garan-

...as por la ley Hipotecaria, que en sus arts. 24 y 34 dispone: que surtirán su efecto aun contra los acreedores singularmente privilegiados por la legislación común, no pudiendo invalidarse, aunque después se anule ó resuelva el derecho del otorgante en virtud de título anterior no inscripto, ó de causas que no resulten claramente del mismo Registro, cuando realmente nada constaba en éste relativo á gravamen hipotecario de clase alguna sobre la finca en cuestión.

»Tampoco sería de eficacia legal en este caso la aplicación de la ley de Partida invocada por los recurrentes, y no ha podido por ello ser infringida; porque obligados éstos á la evicción y saneamiento por la expresada finca, como herederos forzosos de su padre que la vendió, sin que conste que asumieran la herencia de éste, antes bien que solicitaron y obtuvieron judicialmente la declaración de sus herederos, no sólo tendrían que responder de lo mismo que piden, como sucesores del padre en sus derechos y obligaciones, sino que hasta carecen de acción para reclamarlo, por ser condición precisa para ello la división de la herencia, haciendo posesión de los bienes del obligado, lo cual no han realizado, y por tanto, confundido en ellos los dos conceptos de acreedores y deudores, extinguiéndose toda obligación según leyes que oportunamente se citan en los fundamentos del fallo recurrido.» *(Sentencias 11 Mayo 1895.—Gac. 26 Agosto.)*

El cesionario de un crédito cuyo pago se aseguró con hipoteca, no puede ampararse en los arts. 36 y 38, caso 4.°, de la ley Hipotecaria, por no poder ser considerado como tercero con relación á su cedente.

(Sent. 12 Febrero 1896.—Gacs. 8 y 9 Marzo.)

El tercer poseedor de bienes hipotecados no puede reclamársele el cumplimiento de la obligación que garantizan, sin requerir previamente de pago al deudor principal.

«No siendo como no es el demandado deudor principal en la obligación reclamada, sino sólo poseedor de la casa sobre que fué constituída la hipoteca para asegurar la responsabilidad contraída por el padre del recurrente, el Tribunal sentenciador no ha cometido infracción del art. 127 de la ley Hipotecaria al declarar que antes de reclamar del tercer poseedor de la finca hipotecada, cuyo verdadero carácter tiene el recurrido, debió el actor cumplir el requisito del requerimiento al deudor principal, según exige el citado artículo; siendo ninguna aplicación tienen al caso actual los demás artículos de la ley Hipotecaria,.. referentes á la naturaleza y efectos de la hipoteca, que en nada modifican dicha prescripción legal.» *(Sent. 14 Enero 1896.—Gac. 9 Abril.)*

La prohibición de los arts. 23 y 396 de la ley Hipotecaria de admitir documentos no inscriptos en el Registro de la Propiedad, ante los Tribunales, sólo se refiere al caso en que haya un tercero que alegue algún derecho real que pueda ser perjudicado por el documento no inscripto, pero no á las cuestiones que surjan entre el dueño de un inmueble y los acreedores personales del causante del mismo que pretendan realizar su derecho en la finca.

personal quirografario ó escriturario, porque lo dispuesto en ese artículo es un complemento de la doctrina fundamental establecida en el 23, que al determinar que los títulos no inscriptos en el Registro no perjudiquen á tercero, alude al tercero que adquiera el dominio ó un derecho real sobre la misma finca, y porque así lo ha declarado repetidas veces este Tribunal Supremo al fijar la verdadera inteligencia del art. 27, acomodándose á los principios que informan la referida ley.

»Por lo expuesto, no teniendo D. Dionisio Ondovilla, acreedor de los causahabientes de D.ª Dolores Sureda, derecho real alguno sobre los bienes embargados á su instancia que fueron objeto de la tercería de dominio, el título en que los terceristas apoyaron su demanda, consistente en la partición de los bienes quedados por fallecimiento de don Cristóbal Gómez Magaña y de su esposa D.ª Dolores Sureda, la cual fué aprobada por sentencia judicial, y en la que se adjudicaron á los recurrentes, hijos del matrimonio anterior del primero, parte de esos bienes, como de la procedencia exclusiva de su padre, pudo oponerse sin estorbo alguno legal al acreedor Ondovilla; y por lo tanto, la Sala sentenciadora, al declararla ineficaz, por no haberse protocolado la partición ni inscripto en el Registro correspondiente, ha infringido el art. 396 de la ley Hipotecaria, invocado en el motivo 2.° del recurso por su errónea inteligencia é indebida aplicación, y como consecuencia de ella las disposiciones que se alegan en los otros fundamentos.» *(Sent. 23 Mayo 1896.—Gacs. 20 y 22 Septiembre.)*

El comprador de bienes inscriptos que los adquiere de la persona á cuyo nombre lo están, no sufre los efectos de la anulación del título de aquélla.

»Fuera válido ó nulo el expediente en que se hizo á la condesa dicha adjudicación de bienes, como el demandado no intervino en él al adquirirlos por compra y registrarlos á su nombre, le ampara su derecho el art. 34 de la ley Hipotecaria, como tercero que es, puesto que se los transmitió onerosamente la condesa, que aparecía en el Registro con derecho para ello, sin que al así estimarlo la sentencia recurrida y absolver al demandado se hayan infringido los artículos de la ley Hipotecaria y doctrina del Supremo que se citan en el cuarto motivo» (1). *(Sent. 15 Junio 1896.—Gac. 30 Septiembre.)*

No pueden prevalecer los derechos de ciertos pueblos á la servidumbre de pastos sobre fincas cuyos terceros poseedores los adquirieron como libres, y en tal concepto estaban inscriptas en el Registro de la Propiedad.

»Si bien el art. 33 de la ley Hipotecaria establece que la inscripción no convalida los actos ó contratos que sean nulos con arreglo á las leyes, los que se ejecuten ú otorguen, según dispone el artículo 34, por persona que en el Registro aparezca con derecho para ello, una vez inscriptos no se invalidarán en cuanto á los que con ella hubiesen contratado por título oneroso, aunque después se anule ó resuelva el derecho del otorgante, en virtud de título anterior no inscripto ó de causas que no resulten claramente del Registro, pues en este caso se encuentran los demandantes, cualesquiera que

...de la ley de Partida invocada por los ...ntes, y no ha podido por ello ser infringida: ...que obligados éstos á la evicción y saneamiento ...la expresada finca, como herederos forzosos de ...padre que la vendió, sin que conste que acep...ron la herencia de éste, antes bien que solicita...n y obtuvieron judicialmente la declaración de ...s herederos, no sólo tendrían que responder de ...mismo que piden, como sucesores del padre en ...derechos y obligaciones, sino que hasta carecen ...acción para reclamarlo, por ser condición pre...a para ello la división de la herencia, haciendo ...sión de los bienes del obligado, lo cual no han ...plido, y por tanto, confundido en ellos los dos ...eptos de acreedores y deudores, extinguiéndose ...a obligación según leyes que oportunamente se ...an en los fundamentos del fallo recurrido.» *(Sen...cia* 11 Mayo 189?.—*Gac.* 26 Agosto.)

...cionario de un crédito cuyo pago se aseguró con ...hipoteca, no puede ampararse en los arts. 36 y 38, ...caso 4.°, de la ley Hipotecaria, por no poder ser ...considerado como tercero con relación á su codeud...

(Sent. 12 Febrero 1896.—*Gacs.* 8 y 9 Marzo.)

...l tercer poseedor de bienes hipotecados no puede ...reclamársele el cumplimiento de la obligación que ...garantizan, sin requerir previamente de pago al ...deudor principal.

«No siendo como no es el demandado deudor ...incipal en la obligación reclamada, sino sólo po...edor de la casa sobre que fué constituída la ...poteca para asegurar la responsabilidad con...ída por el padre del recurrente, el Tribunal sen...enciador no ha cometido infracción del art. 127 ...la ley Hipotecaria al declarar que antes de re...mar del tercer poseedor de la finca hipotecada, ...yo verdadero carácter tiene el recurrido, debió ...actor cumplir el requisito del requerimiento al ...deudor principal, según exige el citado artículo; ...inguna aplicación tienen al caso actual los ...más artículos de la ley Hipotecaria... referentes ...la naturaleza y efectos de la hipoteca, que en ...da modifican dicha prescripción legal.» *(Sent.* 14 ...ano 1896.—*Gac.* 9 Abril.)

...prohibición de los arts. 23 y 396 de la ley Hipo...tecaria de admitir documentos no inscriptos en ...el Registro de la Propiedad, ante los Tribunales, ...sólo se refiere al caso en que haya un tercero que ...ostente algún derecho real que pueda ser perjudi...cado por el documento no inscripto, pero no á las ...cuestiones que surjan entre el dueño de un inmueble ...y los acreedores personales del causante del mismo ...que pretendan realizar su derecho en la finca.

«El precepto consignado en el art. 397 de la ley ...potecaria, conforme al cual no deben ser admi...dos en los Juzgados y Tribunales, y por ende ...arecen de eficacia los documentos no inscriptos ...el Registro de la Propiedad en que se consti...yan, trasmitan, reconozcan, modifiquen ó extin...an derechos sujetos á inscripción, si el objeto de ...presentación fuese hacer efectivo en perjuicio ...tercero el que debió inscribirse, sólo se refiere ...caso en que el tercero ostente un derecho real ...no á los conflictos que puedan surgir entre el ...cho ó el titular de un derecho *in re* y un acreedor villa, acreedor de los causahabientes de D.ª Dolores Bureda, derecho real alguno sobre los bienes embargados á su instancia que fueron objeto de la tercería de dominio, el título en que los terceristas apoyaron su demanda, consistente en la partición de los bienes quedados por fallecimiento de don Cristóbal Gómez Magaña y de su esposa D.ª Dolores Bureda, la cual fué aprobada por sentencia judicial, y en la que se adjudicaron á los recurrentes, hijos del matrimonio anterior del primero, parte de esos bienes, como de la procedencia exclusiva de su padre, pudo oponerse sin estorbo alguno legal al acreedor Ondovilla; y por lo tanto, la Sala sentenciadora, al declararla ineficaz, por no haberse protocolado la partición ni inscripto en el Registro correspondiente, ha infringido el art. 396 de la ley Hipotecaria, invocado en el motivo 2.° del recurso por su errónea inteligencia é indebida aplicación, y como consecuencia de ella las disposiciones que se alegan en los otros fundamentos.» *(Sent.* 23 Mayo 1896.—*Gacs.* 20 y 22 Septiembre.)

El comprador de bienes inscriptos que los adquiere de la persona á cuyo nombre lo están, no sufre los efectos de la anulación del título de aquella.

«Fuera válido ó nulo el expediente en que se hizo á la condesa dicha adjudicación de bienes, como el demandado no intervino en él al adquirirlos por compra y registrarlos á su nombre, le ampara su derecho el art. 34 de la ley Hipotecaria, como tercero que es, puesto que se los transmitió onerosamente la condesa, que aparecía en el Registro con derecho para ello, sin que al así estimarlo la sentencia recurrida y absolver al demandado se hayan infringido los artículos de la ley Hipotecaria y doctrina del Supremo que se citan en el cuarto motivo» (1). *(Sent.* 15 Junio 1896.—*Gac.* 30 Septiembre.)

No pueden prevalecer los derechos de ciertos pueblos á la servidumbre de pastos sobre fincas cuyos terceros poseedores los adquirieron como libres, y en tal concepto estaban inscriptas en el Registro de la Propiedad.

«Si bien el art. 33 de la ley Hipotecaria establece que la inscripción no convalida los actos ó contratos que sean nulos con arreglo á las leyes, los que se ejecuten ú otorguen, según dispone el artículo 34, por persona que en el Registro aparezca con derecho para ello, una vez inscriptos no se invalidarán en cuanto á los que con ella hubiesen contratado por título oneroso, aunque después se anule ó resuelva el derecho del otorgante, en virtud de título anterior no inscripto ó de causas que no resulten claramente del Registro, pues en este caso se encuentran los demandantes, cualesquiera que sea el derecho de los pueblos demandados al disfrute de pastos en las fincas que aquéllos adquirieron á título oneroso por persona que aparecía con derecho á la transmisión del dominio pleno de ellas, sin que resultara de las propias inscripciones, donde en su caso debían constar, conforme á lo dispuesto en el art. 13 de la ley Hipotecaria, según se hizo constar en la establecida á favor del pueblo de Porto, los gravámenes que pudieran afectarles, ni fuesen de los actores conocidos, como se pretende en el motivo 8.°, ya que este punto esencial

(1) Los arts. 33, 34 y 27?

de Julio de 1895, vendió las 28 fincas del pleito Diego López Rodríguez, quien á su vez, en 11 mismo mes, las enajenó al demandante, D. Toribio Moreno, que fundado en el título de estas ventas, así como en el posterior hecho de haber logrado su inscripción en el Registro, entabló la acción reivindicatoria de las expresadas fincas contra su procedora D.ª Elisa Ortiz:

Considerando que supuestos tales hechos, al dar la Sala segunda de lo Civil de esta Audiencia lugar á la reivindicación pretendida por el fundamento de reconocer á Moreno el carácter de tercero en la posesión de las expresadas fincas y preferente título, por estar inscripto, al de la parte demandada, ha cometido en primer término las infracciones alegadas en los motivos 5.º y 6.º del recurso (1); porque D. Toribio Moreno no adquirió de López Míguez derecho alguno que apareciese del Registro, puesto que la inscripción fué posterior, como queda expuesto, ni puede consiguientemente invocar la garantía del mismo, y porque no resultando del Registro con anterioridad á la inscripción los derechos enajenados por el Estado, que tampoco aparece hecha por título alguno de verdadera propiedad á favor de éste, sino todo lo más de mera presentación, que no puede anular el de los particulares, es evidente que el título de D.ª Elisa Ortiz, como de verdadero dominio por razón del origen de los bienes y de su adjudicación, es preferente al inscripto, ya que de esta inscripción misma no se deriva en todo caso la posibilidad de que el verdadero dueño reclamase contra el hecho de una presentación mal acordada, y es jurisprudencia constante conforme con la ley que una inscripción de carácter posesorio no puede prevalecer contra un título de dominio.» (*Sent.* 6 Junio 1902.—*Gac.* 11 Agosto.)

La prohibición del Derecho procesal civil de admitir en juicio documentos no inscriptos, se refiere al caso en que se trate de hacerlos valer contra los que tengan el concepto de terceros, según la ley Hipotecaria, cuyo carácter no puede reconocerse en la persona que no aduce en contra otro título inscripto.

En sentencia ejecutoria se condenó á D.ª Susana Serrat á entregar la mitad de una finca á D. Buenaventura Quera, y á éste á que indemnizase los gastos útiles y necesarios que en ella había hecho. Pendiente la ejecución del fallo, cedió Quera su derecho, por escritura de 7 de Abril de 1896, á D.ª Antonia Oliveras, que entabló demanda contra el heredero de D.ª Susana, para que restituyera la finca en cuestión al ser y estado que tenía antes de una corta de árboles que había efectuado en la misma.

El demandado se opuso, alegando que la escritura de cesión no podía producir efecto contra tercero, por no haber sido inscripta en el Registro, y que no podía surtirlo contra él por venir á alterar la relación jurídica establecida en una ejecutoria, no pudiendo obligársele á aceptar como deudor á persona distinta de la condenada.

Desestimada la demanda por la Audiencia, interpuso la actora recurso de casación, fundado en haberse infringido el art. 396 de la ley de Enjuiciamiento civil, en relación con los 23 y 27 de la ley Hipotecaria, porque el demandado no había presentado título alguno inscripto de la finca litigiosa, y no podía ostentar el carácter ni los privilegios de tercero, y porque la circunstancia de hallarse ó no inscripto el título en que funda su derecho una de las partes, no obsta á su estimación, cuando aquella á quien perjudica, no deriva el suyo de otro inscripto.

El Tribunal Supremo declara **haber lugar** al recurso:

«Considerando que la escritura de 7 de Abril de 1896, por ser sólo de mera cesión de los mismos derechos ya existentes y registrados, no altera ni ha podido alterar la situación jurídica del recurrido D. Enrique Jordá, que no tenía frente á los cedentes carácter de tercero, ni aduce tampoco título alguno inscripto en él, como sería necesario para poder atribuirle tal carácter, con arreglo á la ley Hipotecaria y á la jurisprudencia de este Tribunal Supremo, siendo visto por ello que ha sido aplicado indebidamente á la resolución del litigio el art. 396 de la antecitada ley, que sólo prohibe la admisión de documentos cuando con ellos se trata de hacer efectivos derechos en perjuicio de los que según la misma merecen concepto de tercero, y que siendo dicho artículo el único fundamento en que se apoya y por el que ha sido dictada la sentencia recurrida, procede la casación al tenor de lo solicitado en el primer motivo del recurso.» (*Sent.* 17 Enero 1903.—*Gac.* 4 Febrero.)

El poseedor de una finca que la sigue ocupando después de adjudicada á su acreedor no puede ostentar los derechos de tercero, respecto á ella, ni evitar el desahucio á pretexto de que el título del adjudicatario no ha sido inscripto.

Una señora era deudora de cierta cantidad, asegurada con hipoteca de una casa que le fué embargada y adjudicada en pago al acreedor.

Este inscribió su derecho, y años después entabló demanda de desahucio contra dicha señora que seguía ocupando la finca. Acordado el lanzamiento, la misma interpuso recurso de casación contra el fallo, porque infringía el art. 396 de la ley Hipotecaria, ya que fué admitido por los Tribunales el título que ostentaba la parte actora, sin embargo de no hallarse inscripto.

El Tribunal Supremo declara **no haber lugar** al

(1) La recurrente alegó en los motivos 5.º y 6.º, las siguientes infracciones:

«5.º Los arts. 445 del Código civil y 403 de la ley Hipotecaria, pues... doña Elisa Ortiz poseyó y sigue poseyendo las 28 fincas que se litigan, habiéndose rechazado antes por medio de dos interdictos las intrusiones, como é intentos de posesión de la parte contraria, no existiendo, por consiguiente, términos hábiles para recobrar á D. Diego López y D. Toribio Moreno como poseedores, así como tampoco á la Hacienda, que ha reconocido su falta total de derecho, pero en último caso, más que puede concederse, conforme al sentido que esos actos atribuye la sent. de este T. S. de 5 Mayo 1901, es que el Estado inscribiera su supuesta posesión y que esta misma posesión se inscribiese luego en forma favorable á favor de López y Moreno, con lo cual tendría lugar completa aplicación el precepto legal antes citado de que siendo dueña la recurrente y teniendo mejores títulos y un derecho superior al de la Hacienda y al que adquirientes la inscripción de mera posesión hecha á favor de aquélla y de éstos no puede perjudicar á doña Elisa Ortiz aunque entonces no tuviera inscripto su do-

...las expresadas fincas y prefereáte ..., por estar inscripto, al de la parte demandante, ha cometido en primer término las infracciones alegadas en los motivos 5.° y 6.° del recurso (1), ...que D. Toribio Moreno no adquirió de López ...ningún derecho alguno que apareciese del Registro, puesto que la inscripción fué posterior, ...como queda expuesto, ni puede consiguientemente ...invocar la garantía del mismo, y porque no resulta ...del Registro con anterioridad á la inscripción ...derechos enajenados por el Estado, que tampoco ...fueron hecha por título alguno de verdadero propietario á favor de éste, sino todo lo más de mera ...posesión, que no puede anular el de los particulares, es evidente que el título de D.ª Elisa ..., como de verdadero dominio por razón del ...pago de los bienes y de su adjudicación, es preferente al inscripto, ya que de esta inscripción misma ...fluye en todo caso la posibilidad de que el verdadero dueño reclamase contra el hecho de una ...posesión mal acordada, y es jurisprudencia ...constante conforme con la ley que una inscripción ...de carácter posesorio no puede prevalecer contra ...título de dominio.» (*Sent.* 6 Junio 1902.—*Gac.* 21 Agosto.)

La prohibición del Derecho procesal civil de admitir en juicio documentos no inscriptos, se refiere al caso en que se trata de hacerlos valer contra los que tienen el concepto de terceros, según la ley Hipotecaria, cuyo carácter no puede reconocerse en la persona que no aduce en contra otro título inscripto.

En sentencia ejecutoria se condenó á D.ª Susana Serrat á entregar la mitad de una finca á

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(1) La recurrente alegó en los motivos 5.° y 6.°, las ...siguientes infracciones:

«1.° Los arts. 445 del Código civil y 1213 de la ley Hipotecaria, pues... doña Elisa Ortiz poseyó y sigue poseyendo las 38 fincas que se litigan, habiéndose rechazado ...por medio de dos interdictos las intromisiones, cobros é intentos de posesión de la parte contraria, no ...siendo, por consiguiente, términos hábiles para recobrar á D. Diego López y D. Toribio Moreno como poseedores, así como tampoco á la Hacienda, que ha recogido su falta total de derecho, pero en último caso, ...más que puede considerarse, conforme al sentido que ...estas actas atribuye la sent. de este T. S. de 5 Mayo ...1899, es que el Estado inscribiera su supuesta posesión ...y esta misma persona debe inscribirse luego en forma ...nueva á favor de López y Moreno, con la cual tendría ...cumplida aplicación el precepto legal antes ...citado de que siendo dueña la recurrente y poseyendo ...el título y un derecho superior al de la Hacienda y al ...de los adquirentes la inscripción de mera posesión hecha ...á favor de aquélla y de éstos no puede perjudicar á doña ...Elisa Ortiz aunque entonces no tuviera inscripto su dominio...»

«2.° Los arts. 33, 34 y 396 de la ley Hipotecaria... puesto que habiéndose demostrado que la enajenación hecha ...á la Hacienda es nula, pues haber vendido una cosa que ...no era suya..., aparece también comprobada la consecuencia lógica de la nulidad de la consiguiente inscripción, ...que á López y Moreno, puede considerárseles como ...tercero, amparados por la excepción del mencionado ...34, porque cuando uno y otro compraron no había ...ninguna inscripción en que apoyarse, ya que caso de ...haberla sería de posesión, no de propiedad; y por más que ...la recurrente doña Elisa no tenía entonces inscripto su título, su derecho aparece siempre como superior al ...de los adquirentes de las fincas...»

que no podía surtirlo contra él por venir á alterar la relación jurídica establecida en una ejecutoria, no pudiendo obligársele á aceptar como deudor á persona distinta de la condenada.

Desestimada la demanda por la Audiencia, interpuso la actora recurso de casación, fundado en haberse infringido el art. 396 de la ley de Enjuiciamiento civil, en relación con los 33 y 27 de la ley Hipotecaria, porque el demandado no había presentado título alguno inscripto de la finca litigiosa, y no podía ostentar el carácter ni los privilegios de tercero, y porque la circunstancia de hallarse ó no inscripto el título en que funda su derecho una de las partes, no obsta á su estimación, cuando aquella á quien perjudica, no deriva el suyo de otro inscripto.

El Tribunal Supremo declara **haber lugar** al recurso:

«Considerando que la escritura de 7 de Abril de 1896, por ser sólo de mera cesión de los ahamos derechos ya existentes y registrados, no altera ni ha podido alterar la situación jurídica del recurrido D. Enrique Jordá, que no tenía frente á los cedentes carácter de tercero, ni aduce tampoco título alguno inscripto en él, como sería necesario para poder atribuirle tal carácter, con arreglo á la ley Hipotecaria y á la jurisprudencia de este Tribunal Supremo, siendo visto por ello que ha sido aplicado indebidamente á la resolución del litigio el art. 396 de la antecitada ley, que sólo prohibe la admisión de documentos cuando con ellos se trata de hacer efectivos derechos en perjuicio de los que según la misma merecen concepto de tercero, y que siendo dicho artículo el único fundamento en que se apoya y por el que ha sido dictada la sentencia recurrida, procede la casación al tenor de lo solicitado en el primer motivo del recurso.» (*Sent.* 17 Enero 1903.—*Gac.* 4 Febrero.)

El poseedor de una finca que la sigue ocupando después de adjudicada á su acreedor no puede estimar los derechos de tercero, respecto á ella, ni evitar el desahucio á pretexto de que el título del adjudicatario no ha sido inscripto.

Una señora era deudora de cierta cantidad, asegurada con hipoteca de una casa que le fué embargada y adjudicada en pago al acreedor.

Este inscribió su derecho, y años después entabló demanda de desahucio contra dicha señora que seguía ocupando la finca. Acordado el lanzamiento, la misma interpuso recurso de casación contra el fallo, porque infringía el art. 396 de la ley Hipotecaria, ya que fué admitido por los Tribunales el título que ostentaba la parte actora, sin embargo de no hallarse inscripto.

El Tribunal Supremo declara **no haber lugar** al recurso:

«Considerando que no es de apreciar la infracción del art. 396 de la ley Hipotecaria, alegada en el único motivo del recurso, porque aparte la inexactitud de la afirmación del recurrente, relativa á no tener inscripto su derecho de dominio el actor sobre la finca objeto del desahucio, el precepto del expresado artículo es de todas suertes inaplicable al caso del actual pleito, porque dada la naturaleza de la acción ejercitada, y no pudiendo ostentar D.ª María Péres Rodríguez derecho alguno de dominio después de haberse adjudicado

...ón en cuestión al desahuciante, carece en abso... de base el supuesto de ser tercero dicho recu... para los efectos de lo preceptuado en el ...lo antes citado, así como en el 27 de la misma ... (*Sent.* 21 Enero 1903.—*Gac.* 27 Febrero.)

...nilegio de que no se invaliden respecto á tercero ... actos ejecutados cuando del Registro no conste ...motivo de su nulidad ó rescisión, no favorece al ...ero que conocía que la persona que la transmitió ... derechos sobre los bienes inscriptos, carecía de ...libre disposición de éstos.

...n hijo vendió á su padre por escritura pública ... bienes que tenía inscriptos en el Registro y ...el comprador no se cuidó de inscribir á su ...bre. Más adelante, el propio hijo hipotecó los ...os bienes á favor de D. Rafael Tosquella y ...Martín Carcasona, en garantía de un préstamo ...de los mismos recibió, y éstos inscribieron el ...o en el Registro. Vencida la obligación, los ...amistas entablaron demanda ejecutiva con... á deudor, obteniendo el embargo de la finca ...a en garantía, sobre la cual inició una tercería ...dominio el padre, pidiendo que se declarase nula ...hipoteca, porque al constituirla carecía su hijo ...ólo derecho sobre los bienes afectos al prés... Estimada la tercería en atención á que ...ado el préstamo se concertó los prestamistas ...as que el inmueble había salido del dominio ...prestatario, se interpuso recurso de casación ...ra el fallo de segunda instancia, bajo el su... de que infringía los arts. 34 y 25 de la ley ...otecaria y la doctrina concordante.

El Tribunal Supremo declara **no haber lugar** al ...rso:

Considerando que el sentido y espíritu del ar... 34 de la ley Hipotecaria no es tan absoluto, ...la repetida jurisprudencia de este Tribunal Su..., que otorgue la consideración de tercero al ...contrata un préstamo con hipoteca sobre un ...ueble, á sabiendas de que ha sido anteriormente ...cado por el mismo que con él contrató, aun ...ndo esto no aparezca del Registro, siempre ...dicho conocimiento se haya revelado en actos ...pios del adquirente, ó en hechos cuya signifi... no pueda desconocerse, demostrativos de ...sentimiento, porque en tal supuesto falta el ...damento y razón de la ley para que á este cono...iento se le pueda atribuir dicha trascendencia ...al sin desvirtuar el precepto terminante de la ...Hipotecaria, pues siendo uno de sus principales ...tos el de la publicidad de las cargas, gravá... ...s y demás vicisitudes que afecten á la pro...dad inmueble para que nadie sea responsable ...la que ignore, es indudable que, con arreglo á ...a ley, no puede considerarse como tercero al ...si bien no intervino en el acto ó contrato, tuvo ...rto conocimiento de él, doctrina que está de ...erdo con los principios de Derecho, según los ...les no cabe impugnar aquello que se aceptó sin ...esta, ó que expresa ó tácitamente se consintió: Considerando que declarado probado por la Sala ...tenciadora que D. Rafael Tosquella y D. Mar... Carcasona tenían conocimiento y les constaba ...los bienes que D. Luis de Mercader les debía ...garantía del préstamo que les firmó en escritura ...o de Septiembre de 1895, no pertenecían á éste, ...á su padre D. Joaquín de Mercader, á quien ...había transferido por otra escritura de 2 de ...no ha cometido las infracciones de los arts. 25 y 34 de la ley Hipotecaria que se alegan en los dos motivos del presente recurso, para alegar las cuales infracciones se prescinde del supuesto de hecho á que antes se hace referencia.» (*Sent.* 13 Mayo 1903. —*Gac.* 8 Junio.)

Es eficaz la adquisición de una mina, enajenada en procedimiento administrativo de apremio, por virtud de escritura judicial inscripta á favor de los adquirentes en el Registro de la Propiedad; sin que obste á ello que el procedimiento fuese después declarado nulo, cuando la causa de la nulidad no constaba en la inscripción de dominio extendida á nombre del deudor.

El dueño de una mina inscripta á su nombre en el Registro de la Propiedad, fué sometido á procedimiento administrativo de apremio á consecuencia del cual se le embargó dicha mina. Enajenada ésta en pública subasta, fué adjudicada á D. Francisco García Tamurejo, que transmitió su derecho á diferentes personas, á favor de quienes la autoridad judicial otorgó escritura de venta en nombre y representación del deudor. Algunas de éstas cedieron el suyo á otras, pero todas inscribieron su participación respectiva en el Registro. Declarado nulo el apremio que se había seguido contra el dueño de la mina, el propio interesado entabló demanda judicial para que se reconociese que también eran nulas las adquisiciones de la mina realizadas por consecuencia de aquel procedimiento. La Audiencia accedió á esta pretensión, y contra la sentencia interpusieron recurso de casación los compradores de la mina, por entender que infringía los arts. 27, 34, 36 y 37 de la ley Hipotecaria (motivos 1.° á 5.°).

El Tribunal Supremo declara **haber lugar** al recurso:

«Considerando que según los preceptos claros y terminantes de los arts. 34, 36 y 37 de la ley Hipotecaria, los actos ó contratos que se ejecuten ú otorguen por persona que en el Registro aparezca con derecho para ello, no se invalidarán en cuanto á tercero, aunque después se anule ó resuelva el derecho del otorgante por causas que no resulten claramente del mismo Registro, ni pueden tampoco prevalecer contra terceros, acciones rescisorias ó resolutorias que deban su origen á causas que no consten explícitamente en aquél:

Considerando: que los recurrentes... tienen notoriamente el carácter de terceros en el contrato de venta otorgado judicialmente á favor de D. Francisco García Tamurejo, por consecuencia del procedimiento de apremio seguido contra D. Angel López Ceca, dueño de la mina que fué objeto del apremio y de la subasta, porque, además de no haber sido parte en dicho contrato, adquirieron sus respectivas participaciones en la expresada mina, unos del referido García Tamurejo, otros de los que ya habían adquirido por contrato con éste, después de inscripta por el mismo en el Registro la adquisición del inmueble, y porque, anulado el primer contrato por la resolución administrativa, dictada á instancia de Ceca, en virtud de la que fué declarada la nulidad del procedimiento de apremio, ni en el primitivo título del mencionado Ceca, ni en el de García Tamurejo, aparece que se hiciera referencia alguna á la reclamación del primero, de la cual pudiera derivarse, como se derivó,

vendió á su padre por escritura pública
bienes que tenía inscriptos en el Registro y
el comprador no se cuidó de inscribir á su
re. Más adelante, el propio hijo hipotecó los
s bienes á favor de D. Rafael Tosquella y
rtín Carcasona, en garantía de un préstamo
e los mismos recibió, y éstos inscribieron el
en el Registro. Vencida la obligación, los
mistas entablaron demanda ejecutiva con-
deudor, obteniendo el embargo de la finca
en garantía, sobre la cual inició una tercería
minio el padre, pidiendo que se declarase nula
poteca, porque al constituirla carecía su hijo
ho derecho sobre los bienes afectos al prés-
Estimada la tercería en atención á que
o el préstamo se concertó los prestamistas
a que el inmueble había salido del dominio
restatario, se interpuso recurso de casación
el fallo de segunda instancia, bajo el su-
to de que infringía los arts. 34 y 25 de la ley
tecaria y la doctrina concordante.

Tribunal Supremo declara **no haber lugar** al
so:

«Considerando que el sentido y espíritu del ar-
o 34 de la ley Hipotecaria no es tan absoluto,
a repetida jurisprudencia de este Tribunal Su-
mo, que otorgue la consideración de tercero al
contrata un préstamo con hipoteca sobre un
ueble, á sabiendas de que ha sido anteriormente
nado por el mismo que con él contrató, aun
io esto no aparezca del Registro, siempre
dicho conocimiento se haya revelado en actos
os del adquirente, ó en hechos cuya significa-
n no pueda desconocerse, demostrativos de
esentimiento, porque en tal supuesto falta el
damento y razón de la ley para que á este cono-
iento se le pueda atribuir dicha trascendencia
al sin desvirtuar el precepto terminante de la
Hipotecaria, pues siendo uno de sus principales
tos el de la publicidad de las cargas, gravá-
es y demás vicisitudes que afecten á la pro-
ad inmueble para que nadie sea responsable
a que ignore, es indudable que, con arreglo á
a ley, no puede considerarse como tercero al
, ó bien no intervino en el acto ó contrato, tuvo
ecto conocimiento de él, doctrina que está de
uerdo con los principios de Derecho, según los
les no cabe impugnar aquello que se aceptó sin
uesta, ó que expresa ó tácitamente se consintió:
Considerando que declarado probado por la Sala
enciadora que D. Rafael Tosquella y D. Mar-
Carcasona tenían conocimiento y les constaba
los bienes que D. Luis de Mercader les debía
garantía del préstamo que les firmó en escritura
20 de Septiembre de 1895, no pertenecían á éste,
ni á su padre D. Joaquín de Mercader, á quien
los había transferido por otra escritura de 2 de
iembre de 1894, sin que contra esta aprecia-
n de prueba exista recurso deducido en forma;
sentencia recurrida aplica rectamente la doctri-
antes expuesta, y al negar á los recurrentes la
sideración ó concepto de terceros respecto del
trato de cesión ó transferencia de bienes hecha
D. Luis de Mercader en favor de su padre don
aquín, y al dar lugar á la tercería de dominio
ducida por éste declarando la nulidad de la hipo-
a constituída en favor de Tosquella y Carcasona
ndando cancelar su inscripción en el Registro,
constaba en la inscripción de dominio extendida á nombre del deudor.

El dueño de una mina inscripta á su nombre en el Registro de la Propiedad, fué sometido á procedimiento administrativo de apremio á consecuencia del cual se le embargó dicha mina. Enajenada ésta en pública subasta, fué adjudicada á D. Francisco García Tamurejo, que transmitió su derecho á diferentes personas, á favor de quienes la autoridad judicial otorgó escritura de venta en nombre y representación del deudor. Algunas de éstas cedieron el suyo á otras, pero todas inscribieron su participación respectiva en el Registro. Declarado nulo el apremio que se había seguido contra el dueño de la mina, el propio interesado entabló demanda judicial para que se reconociese que también eran nulas las adquisiciones de la mina realizadas por consecuencia de aquel procedimiento. La Audiencia accedió á esta pretensión, y contra la sentencia interpusieron recurso de casación los compradores de la mina, por entender que infringía los arts. 27, 34, 36 y 37 de la ley Hipotecaria (motivos 1.° á 5.°).

El Tribunal Supremo declara **haber lugar** al recurso:

«Considerando que según los preceptos claros y terminantes de los arts. 34, 36 y 37 de la ley Hipotecaria, los actos ó contratos que se ejecuten ú otorguen por persona que en el Registro aparezca con derecho para ello, no se invalidarán en cuanto á tercero, aunque después se anule ó resuelva el derecho del otorgante por causas que no resulten claramente del mismo Registro, ni pueden tampoco prevalecer contra terceros, acciones rescisorias ó resolutorias que deban su origen á causas que no consten explícitamente en aquél:

Considerando: que los recurrentes... tienen notoriamente el carácter de terceros en el contrato de venta otorgado judicialmente á favor de D. Francisco García Tamurejo, por consecuencia del procedimiento de apremio seguido contra D. Angel López Ceca, dueño de la mina que fué objeto del apremio y de la subasta, porque, además de no haber sido parte en dicho contrato, adquirieron sus respectivas participaciones en la expresada mina, unos del referido García Tamurejo, otros de los que ya habían adquirido por contrato con éste, después de inscripta por el mismo en el Registro la adquisición del inmueble, y porque, anulado el primer contrato por la resolución administrativa, dictada á instancia de Ceca, en virtud de la que fué declarada la nulidad del procedimiento de apremio, ni en el primitivo título del mencionado Ceca, ni en el de García Tamurejo, aparece que se hiciera referencia alguna á la reclamación del primero, de la cual pudiera derivarse, como se derivó, la nulidad del mencionado apremio, habiendo consiguientemente los referidos recurrentes adquirido sus participaciones mineras con la garantía segura del Registro, puesto que respecto de estos terceros afirma el Tribunal sentenciador que, *en su modo de adquirir la mina, ignoraban que existiese vicio que lo invalidara, debiendo ser considerados poseedores de buena fe:*

Considerando: que, por lo que acaba de exponerse, son de estimar, en primer término las infracciones alegadas en los cuatro motivos primeros

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 497.

MARIO MERCADO E HIJOS, *Petitioner*,

v.

ELVIRA OLIVIERI COMMINS, ET AL., *Respondents*.

REPLY BRIEF FOR PETITIONER.

WILLIAM CATTRON RIGBY,
PEDRO M. PORRATA,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 497.

MARIO MERCADO E HIJOS, *Petitioner*,

v.

ELVIRA OLIVIERI COMMINS, ET AL., *Respondents*.

REPLY BRIEF FOR PETITIONER.

I.

Respondents' brief ("Opposition") fails directly to answer the essential points in our Petition for Certiorari, Supporting Brief, and Supplemental Brief. Respondents permit themselves wholly immaterial observations; and even, in one or two instances, to make statements directly contrary to the record.

II.

The gist of the story plainly is that the Passarell family, with lands adjoining those of Mrs. Olivieri Commins on the one side (R. 109) as those of the Mercado family did on another side (R. 322-323; petition for certiorari p. 4), and who had long desired them [had wanted to buy them for at least two years; Francisco Passarell Lluberas' testimony; R. 110], succeeded through their mother Doña

Elena Passarell Lluberas de Delgado, with her friendship for Mrs. Olivieri Commins [Doña Elvira], in inducing the latter to agree to sell and to lease them, so as to enable Doña Elena to make a present of them to her children. That was late in January or early in February, 1937. (R. 165-166; 381-383; petition, Appendix II, pp. 44-46). Francisco says that his mother, who now lives in New York, visited the Island for the last time in February of that year (R. 104).

The option held by the Mercado firm required notice to them of any offer to purchase or lease. Here was an offer,—and, in fact, an acceptance;—and notice should of course have been given to the firm. And all the parties plainly knew it.

Mrs. Olivieri Commins had been since the December previous,—and was actually then,—in negotiations with the Mercado firm,—initiated by herself, through her son-in-law Barletta,—seeking to get an offer, and had just recently been expressly told, on January 4, 1937 (Mercado to Barletta; R. 172-173), that "we had an option to purchase or lease on the same terms."

It was after that, that she and the Passarell family with the assistance of her son-in-law, Barletta, resorted to the trick of a simulated mortgage and the elaborate machinery by which they put Doña Elena's gift money into her son Francisco Passarell Lluberas' hands as a trustee, to hold until it could be paid over to the Tous Soto heirs as mortgagees, and the mortgage having been thus extinguished on the record, Mrs. Olivieri Commins could,—(colorably free of the option, on the face of the record),—convey and lease the properties to the Passarell family.

B. The trouble with all this elaborate machinery is its very elaborateness. Why go to all that trouble and the round-about methods, if there had been nothing to hide?

C. The rights of the parties were fixed by the offer of Doña Elena to Doña Elvira and its acceptance. All the rest was mere machinery. The option took effect, and the

rights of the Mercado partnership under it accrued and became fixed at the moment of the offer. That moment the Mercado firm became entitled to notice of that offer, so as to give it the opportunity to exercise its option, if it should see fit.

D. The elaborate simulated mortgage, and all the other accompanying transactions were really nothing; and could not affect the option rights at all. As the Supreme Court of Puerto Rico had itself said in *Colon* v. *Colon*, 51 P. R. Rep. 95,101-102, quoted in our "Supplemental Brief" (p. 3), such a simulated conveyance "was an absolute nullity."

E. As pointed out in our original petition (p. 10), both of the insular Courts,—the District Court, followed in this by the Supreme Court,—expressly found that not only Mrs. Olivieri Commins, but also all of the other respondents, the entire Passarell family,

> "were advised", "of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates 'Juanita' and 'Indios'" (R. 39).

Under those circumstances they could not take shelter behind the registry provisions of the Mortgage Law, or of the Civil Code; as has been several times squarely held by the insular Supreme Court itself, as pointed out in our Petitioner's Supplemental Brief (pp. 2-4).

Respondents' brief attempts no direct reply to this.

III.

RESPONDENTS' PROPOSITIONS.

Respondents rest their case in essence upon these propositions:

1. That (*Brief*, p. 17) the conclusions of the local courts and their application of the different local statutes involved to the facts of the case, should not be interfered with by an appellate court; and that Rule 39(b) of the Circuit Court of Appeals is reasonable, and was correctly applied to this case.

2. That if petitioner felt itself aggrieved by the decisions either of the District Court or of the insular Supreme Court or of the Circuit Court of Appeals it should have asked that the various decisions be "reconsidered" by those Courts; and that, not having asked such reconsiderations, it is not entitled to have their decisions reviewed by higher courts.[2]

3. That on the face of the registry respondents have a good chain of title [created by the elaborate machinery which they set up].

4. That the actual intent of the parties in the sale of the mortgage notes to the Tous Soto heirs in 1933, is overridden by Section 152 of the Mortgage Law and Sections 1418 and 1759 of the Civil Code, which [they contend] had the effect of transferring to the heirs the entire ownership in all the rights created by the instrument of March 23, 1932, the so-called "Mortgage Deed" between Mrs. Olivieri Commins and the Mercado firm, including, and necessarily carrying to the heirs, as they contend, not only the mortgage securing the "bearer" notes, covered by the first six clauses of the instrument, but also the wholly independent contracts between the parties for the option to purchase or lease (Clause "Seventh"), and forbidding partition of the estates between the sisters without the consent of the partnership, the lessee of both estates as well as the mortgagee (Clause "Eleventh").[3]

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[2] Seemingly strange doctrine; and seemingly quite at variance with respondents' complaint (*Brief*, p. 22) that this litigation has already lasted for "seven long years". For how much longer time would respondents think it should have been dragged out, by stopping to ask reconsideration at each stage, of each court's decision?

No complaint is made of any delay in the litigation on petitioner's part, at any time. The complaint seems to be, simply, that petitioner has insisted on presenting its rights to the courts.

[3] This despite the facts that, as pointed out in our original Petition and Supporting Brief: (a) There was no instrument of assignment of the mortgage deed itself, but only of the "mortgage credits", effected by delivery of the bearer notes; (b) That even the transfer of the notes was not an outright transfer, but that on

5. That the District Court's finding, approved by the insular Supreme Court, above quoted, that prior to the sale and lease of March 9, 1937, all of the respondents "actually were advised",

> "of the right of option to purchase and lease held by Mario Mercado e Hijos,"

meant only that the respondents knew of the original execution of the "Mortgage Deed" of March 23, 1932, containing that option; and that the finding did not mean that the Court found that the respondents knew that the Mercado firm still held or was claiming the right to exercise that option.[4]

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the contrary the partnership retained an interest in them to the extent of retaining three-quarters one one per cent per annum of the interest accruing on them, and in consideration of that, (c) Undertook and guaranteed, absolutely, to *advance* in *monthly installments* the eight and one-quarter per cent interest sold to the heirs [so as to give the widow and the children of Tous Soto a regular guaranteed monthly income]; and (d) That, to that end, the partnership retained the right and duty under Clause "Fourth" of the so-called "Mortgage Deed" of March 23, 1932, to collect the interest semi-annually from the mortgagor Mrs. Olivieri Commins by means of retaining it out of the rent money accruing to her as the owner of the property from the partnership as lessee, and thus to reimburse itself for its monthly advances to the heirs, and to collect the three-quarters of one per cent interest remaining due to itself.

That, of course, all appeared of record on the face of the instrument assigning the "bearer" notes secured by the mortgage. It showed an active interest retained, and active duties remaining to be performed by the partnership, even under the mortgage clauses, strictly so considered, of the "mortgage deed" of March 23, 1932; and plainly negatived any intent to assign it outright to the Tous Soto heirs.

[4] Despite the uncontradicted evidence to the contrary; particularly, for example, that of Mr. Mercado (R. 173) that on January 4, 1937, he expressly reminded Mr. Barletta, Mrs. Olivieri Commins' son-in-law and agent, in replying to the latter's request for an offer on the property, *of the option which the firm held;* and the admissions of respondent Francisco Passarell Lluberas himself that Mrs. Olivieri Commins had said to him that she was not free to sell because of the option held by the Mercado firm (R. 121-122); and that he had been desirous of buying the property for some two years (R. 110).

6. That the intervention of the Mercado firm in the partition deed of the properties between the sisters on August 20, 1936, for the purpose of giving its consent to the partition, in accordance with the provisions of Clause "Eleventh" of the "Mortgage Deed" of March 23, 1932, means nothing; because, as respondents now set up (*Brief*, p. 14):

> "*Such intervention is explained by the fact that, at that time, the partnership Mario Mercado e Hijos was* the mortgage creditor of *Santia Olivieri Commins*, that the shares which the referred to Santia Olivieri Commins had in the 'Indios' and 'Juanita' properties were mortgaged to that partnership, and that in this mortgage contract Mario Mercado e Hijos had forced upon the mortgagor a clause similar to the option to purchase and sell and to lease clause contained in the mortgage entered into between Elvira Olivieri Commins and Mario Mercado e Hijos (Rec. 227-236). *As far as Santia Olivieri Commins was concerned, the intervention of the partnership* Mario Mercado e Hijos in the said deed of partition *was a legitimate one; but it was not so as far as it concerned Elvira Olivieri Commins* who owed nothing at that time to Mario Mercado e Hijos." (*Italics supplied.*)[5]

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[5] This statement in the brief appears to be in direct conflict with the very record of the deed of partition to which it refers (Exhibit "A" for plaintiff, R. 225-259); and it appears also to be an afterthought, occurring to respondents now for the first time; and to be in conflict also with their admissions in their answers in the District Court (R. 22, 27), and with that Court's findings (R. 38), noted in our original Petition (pp. 6-7; 42). The partition deed recites the two mortgages of the two sisters, the one given by Doña Santia (R. 227-232), and the other by Doña Elvira Olivieri Commins (R. 232-237), each at length,—including in the latter the provisions creating the security of the "bearer" notes including the provision ("Fourth"; R. 234, for the retention by the partnership, out of the rentals, of the $4100.00 per annum, in semi-annual portions on March 4 and June 2 of each year, to be applied to the interest accruing; and also the option clause ("Seventh"; R. 235), as well as the consent clause "Eleventh" (R. 236),—all recited at length, *and without any mention anywhere of the assignment of May, 1933, four years earlier, of the bearer notes or "Mortgage Credits" to the Tous Soto heirs,—or any mention whatever of those heirs at all, or any mention of any assignment at all of the indebt-*

7. In this connection respondents' brief also says (*Brief*, p. 18):

"The petitioner speculates on and misrepresents the intervention that partnership Mario Mercado e Hijos had in the division or partition of the 'Indios' and

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edness, or of the March 23, 1932, instrument, or of any change whatever in its ownership or in the relations with regard to it of the parties, the Mercado partnership and Mrs. Olivieri Commins; and then after the provisions for the partition of the properties between the sisters (R. 238-255) including provisions (R. 252) that:

"Twelfth:—As the estates Juanita and Los Indios have been planted to Sugar canes and lessee, Mario Mercado e Hijos, has gone on doing the same, any sugar quota that may be assigned to said estates under the Costigan-Jones Act or by the Secretary of Agriculture of the United States of America shall be divided up in equal shares for the land adjudicated to Mrs. Santia and Mrs. Elvira Olivieri Commons."

"Thirteenth:—The mortgages constituting a lien upon the respective condominiums which formerly belonged to Mrs. Santia and Mrs. Elvira Olivieri Commons in the two estates which have been involved in the dissolution of the joint ownership, will continue as a lien in every respect upon the parcels respectively adjudicated to said mortgagors."

and then there follow the closing provisions embodying (R. 255-256) the consent of the Mercado partnership, and the express acknowledgment of all of the parties of being "fully aware of the whole contents of this deed", and that "the same has been drafted pursuant to a previous agreement", reading as follows:

"Eighteenth:—It is stated by the parties herein that *the partnership Mario Mercado e Hijos appears in this deed through its attorney-in-fact, Jose R. Peralta, solely and exclusively for the purpose of the consent given by said partnership as interested in the mortgage credits above mentioned to the partition of the jointly owned properties carried out therein,* but that it does not bind itself by, nor is it responsible for, the stipulations contained in the clauses of the present deed and that, as far as said partnership is concerned, any of said clauses affecting its rights as present lessees of the estates and adjoining property owners of the estate Los Indios shall be held as non-existent."

"Nineteenth:—The parties hereto Mrs. Santia Olivieri Commins and her husband Mr. Narciso Ferrer Sardo and Mrs. Elvira Olivieri Commins and Mr. Jose R. Peralta as the attorney-in-fact of Mario Mercado e Hijos fully aware of the whole contents of this deed, accept the same in all its parts and in those parts concerning them individually because the same has been drafted pursuant to a previous agreement."

'Juanita' properties between Elvira Olivieri Commins and Santia Olivieri Commins, as per deed No. 33 of March 20, 1936 (Exhibit "A" for plaintiff, Rec. 255-256)." [*The same partition deed described in the preceding paragraph, and in the preceding footnote 5 hereof.*][6]

Respondents fail to say wherein petitioner has in any way improperly "speculated on", or has in any way "misrepresented" the Mercado partnership's intervention in that partition deed for the purpose of giving its consent as required by the provisions of Paragraph "Eleventh" of the March 23, 1932, Mortgage Deed.

It was through that very partition deed that the respondents took title, since it was the title received by Mrs. Elvira Olivieri Commins by that partition deed to the estate "Indios" which she attempted to transfer to the Passarell family respondents by the deed of March 9, 1937 (Exhibit "B", R. 260-269); and it was the title which she received by that partition deed to the estate "Juanita", that she assumed to lease to the respondent Blasini

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[6] Petitioner said, in the petition for certiorari (pp. 6-7) and in "Appendix II" thereto (p. 42),—with *absolute accuracy*, as it is submitted,—

> "And it was clearly understood between the parties that, in fact, the option was not intended to be assigned, but was reserved to the Mercado partnership, as was also the right to be consulted and to give its 'consent', upon any partition of the lands." • • • And that such was actually the understanding at the time, was shown on the public records later on, by the fact that upon the partition of the lands between Mrs. Commins and her sister three years afterwards, on August 20, 1936,—before any of the questions here involved had arisen,—*it was the Mercado partnership,*—and not the Jose Tous Soto heirs,—*who appeared with the parties in the formal partition deed for the purpose of giving its 'consent' to the partition under Paragraph 'Eleventh' of the original 1932 deed (District Court's Findings of Fact; R. 38).*"

[And the same thing, substantially, was repeated in somewhat different phraseology in our "Chronological Analysis of the Facts" Appendix II, at page 42, *supra*].

and his wife Celia Passarell Lluberas on the same date March 9, 1937 (Exhibit "T", R. 375-380). Necessarily, therefore, all of the respondents are bound to notice of everything in that partition deed.

8. Respondents further contend (*Brief*, p. 67) that Mrs. Elvira Olivieri Commins denied having received any offer from Doña Elena Passarell de Delgado, the mother of the Passarell respondents.

Mrs. Olivieri Commins' statement of that conversation with her friend, Doña Elena,—the statement she made when asked about it in the presence of the stenographer on April 6, 1937, during the notarial act of making formal demand upon her for rescission of the sale and the lease (R. 164-167),—is set out in Appendix II to our original petition for certiorari (pp. 44-56).

Her confused and halting attempted denial of it two years later, when recalled to the witness stand the second time by the respondents during the trial of this case in the District Court in November, 1939 (R. 218-222), [and when admitting, also, on cross-examination that she might have testified differently upon the former trial in the ejectment suit: "*Maybe. It is now two years since that*"],—is in Appendix I to this reply brief (*infra*, pp. 30-32).

It is noteworthy that the District Court made no finding upon her testimony, and that the respondents do not even attempt further to support it than simply to note (*Brief*, p. 67) the fact that she did enter this denial. And it is noteworthy also, that Francisco Passarell Lluberas himself testified (R. 104) that his mother, Doña Elena Passarell de Delgado, actually did visit Puerto Rico about the month of February, 1937, the time when Mrs. Olivieri Commins said in her statement before the notary on April 6, 1937, which was taken down by the stenographer, that that conversation between the two ladies had taken place.

And that it did actually take place, as she said then, and that the succeeding transactions were built upon it, or

upon some similar conversation or agreement made about that time, is plainly indicated by the sequence of events.

IV.

Further comments on respondents' propositions.

A. Our comments on most of respondents' propositions are contained in the preceding footnotes (*ante*, pp. 4-8). It may be observed further:

B. With further reference to Mrs. Olivieri Commins' confused attempted denial at the trial of the present case of her statement two years earlier concerning her conversation with her friend Doña Elena (Mrs. Passarell-Delgado), and the latter's offer to purchase the "Indios" estate for her children upon condition that Doña Elvira (Mrs. Olivieri Commins) would also lease the "Juanita" estate at the same time to her own nephew Blasini, whose wife Celia was likewise one of Doña Elena's daughters,—and as to the present reliance of the respondents on that denial and on the lack of any clear cut finding either one way or the other by either of the insular courts as to that conversation between the two ladies,—it is to be observed that Mrs. Olivieri Commins' [Doña Elvira's] denial of it is really, in a way, wholly immaterial here.

C. That is to say, it is really self-evident, without any direct testimony at all, that some such conversation must have taken place, at some time along in the early part of the winter of 1936 to 1937, in January or February, between Doña Elvira [Mrs. Olivieri Commins] and some member of the Passarell Lluberas family, either the mother Doña Elena or some one of respondents or some agent for them, and must have resulted in some offer to Doña Elvira, and her acceptance of it in some form, upon which the elaborate succeeding transactions were based, leading up to the instruments of sale and lease of March 9, 1937. The testimony of Blasini (R. 186-199), and of Francisco Lluberas Passarell (R. 104 *et seq.*) and of Mrs. Olivieri Commins

herself (R. 79 *et seq.*) concerning their doings on March 8th and 9th, together with the hide-and-seek game played by her son-in-law and agent, Barletta, with Mr. Mercado and Mr. Peralta, the Mercado firm's manager, during the whole winter (R. 127 *et seq.*; 172 *et seq.*; and Exhibits "N" to "S," R. 371-374, letters and telegrams), and Barletta's evasive statement to Peralta, when the latter ran across him in attorney Zapater's office on March 8th, the very day they were actually closing up the transaction for the cancellation of the 1932 mortgage behind Mercado's back and without any notice to that firm, when Barletta still said to Peralta that their transactions were coming along in good shape,—plainly meaning to give Peralta to understand that he was referring to the negotiations between them for a sale of the property to the Mercado firm, but equally plainly meaning in his own mind to refer to the transactions for the sale and lease to the respondents (R. 145-146; 181),—and Barletta's evasion of process to compel his attendance as a witness at the trial of this case, and apparent absence from the Island then (R. 184-186),—*all of those things are too fantastic on any other theory* than that an offer of some kind had actually been made to Mrs. Olivieri Commins and accepted by her, and that the machinery was being put into effect to endeavor to consummate that transaction behind the Mercado firm's back, and without notice to it.

D. The findings and the decision of the District Court do not go upon any question of comparative veracity of the witnesses, but solely upon a question of law; primarily on that Court's finding that as a pure matter of law the May, 1933, assignment of the mortgage notes to the Tous Soto heirs necessarily carried to the heirs all of the rights of every kind under the March 23, 1932, mortgage deed, despite the contrary actual intention of the parties, and despite the independent character of the clauses "Seventh" and "Eleventh" covering the option and the right to be consulted and to consent before any partition of the estates between the sisters, and despite the limited character of

the assignment even of the "bearer" notes themselves, and despite the record three years later of the August 20, 1936, partition deed between the sisters, recognizing that it was still the partnership, the original mortgagee, and not the Tous Soto heirs, whom all the parties were treating as still the holder of the mortgage deed, and despite the solemn declaration in Court of the Tous Soto heirs themselves by their deed of March 31, 1937 (Exhibit "E", R. 281-286), apparently executed as soon as the question was called to their attention, acknowledging that such was the actual intent of the parties, and despite the provisions of Sections 1233 to 1241 of the Civil Code that the actual intent of the parties to a contract shall govern, and despite the former decisions of the Supreme Court of Puerto Rico itself and of the Supreme Court of Spain that actual knowledge cures or supplies any lack of notice or defect in the Registry,[8] and that a party possessed of actual notice or knowledge can never take shelter behind the letter of the registry laws as an innocent "third party," and despite that court's own positive finding that all of the respondents here actually had full notice, before the execution of the March 9, 1937, deed and lease, of the Mercado firm's continuing to hold the option.

That judgment, followed and affirmed by the insular Supreme Court, was clearly and even "inescapably" wrong.

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[8] Supplemental Brief for Petitioner, pp. 2-5, and Appendix II, and see also *infra*, pp. 13-26.

V.

Respondents' personal knowledge supplied any possible lack of notice in the record of the reservation of the option to the partnership, in the May, 1933, assignment of the "Mortgage Credits" by the limited transfer of the "bearer" notes.

Supplementing what we have already said in our original Petition and Supporting Brief, and in Points VI and VII and Appendix II in Petitioner's Supplemental Brief, and replying further specifically to what is said on this point in respondents' brief.

Going back to the unlawful detainer or ejectment case, between the same parties here,—unsuccessfully brought by the Lluberas-Passarell respondents against the Mercado partnership, in June, 1937, for possession of the estate "Indios" upon the expiration of the partnership's old ten-year lease, in which the Lluberas-Passarell's were defeated both in the District Court and also on their appeal to the insular Supreme Court,—the issue in that case was: Who shall retain possession of the property while this plenary suit is pending? *Lluberas* v. *Mercado*, 55 P. R. Rep. 39. To us it is obvious that the palpable error committed by the insular Supreme Court in the present case came from that Court having departed from the principle and method of approach followed in that unlawful detainer case, where the Court found the Mercado firm had the right to immediate possession simply because the Lluberas-Passarell family had notice of the option and deliberately tried to violate it. It found as follows:

> *"We do not wish to reach any conclusions in this case which might affect the decision of the questions on their merits, but we do state that the evidence of the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, supra; that they knew*

that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option."

The unlawful detainer action under the facts of our case, as in the case of *Wheeler* v. *Standard Oil Co.*, 263 N. Y. 34, where the *mala fide* buyer also bought with notice of the option and also filed ejectment against the lessee-optionee, turned upon the question of notice and the effect of notice. In *Wheeler* v. *Standard Oil*, however, the optionee filed a counterclaim and not an independent action, but it is obvious that both cases, the ejectment action and the action to enforce the option, rested upon the same set of facts. When such is the situation, it is clear that the facts found in one case are decisive for the other.

The doctrine of the *Wheeler* case, as shown in our original and supplemental briefs, is the same doctrine prevailing everywhere. Strange enough, it is the unanimous doctrine of the Supreme Courts of Puerto Rico, Spain, English Courts, Federal Courts, and States of the Union Courts. It is to the following effect (*Wheeler* v. *Standard Oil Co.*, N. Y. Rep. 263; pp. 36, 37-39):

"The appellant leased a portion of a village lot from Thomas Kerley as trustee and Annie T. Chew, the owners, for a term of five years. *The lease contained an option to purchase.* The lessee went into possession and erected a gas station and made other improvements on the lot. Thereafter, the respondents, as members of the Board of Education of School District No. 1, purchased the entire village lot, including the land leased to appellant. *The premises were purchased by respondents with notice of the terms of appellant's lease and of the option contained therein. The appellant complied with all the terms of the lease and duly exercised its option and in all respects complied with its terms.* The respondents refused to comply with the terms of the option and convey the premises to the appellant-lessee." * * *

"One who purchases land and accepts a deed thereof, *with full knowledge that a lessee in possession has*

> *a right under his lease to purchase the land* leased, upon complying with the terms of the lease takes the land subject to the terms of the lease and may be compelled in equity to carry out its terms by conveying the land to the lessee upon his complying with the terms of the contract. *One who purchases with notice of equities is bound thereby. Lovejoy* v. *Potter*, 60 Mich. 95; *Hodge* v. *Sloan*, 107 N. Y. 244; Story's Eq. Juris. (Vol. 1, 10th ed.) Secs. 395 and 396; Real Prop. Law, Sec. 223; Cons. Laws, ch. 50.)'' (*Italics Supplied.*)

It is obvious, we repeat, that in *Lluberas* v. *Mercado, supra,* as in the *Wheeler* case, respondents' notice of the existing option was fundamentally the controlling factor. Failure to realize, when deciding the instant case, that notice is everything in cases of this type, is what led the Puerto Rican Supreme Court into the commission of an inescapable error in the present case (departing from its principles of its former decision in the ejectment or unlawful detainer *Lluberas* case), which does violence to fundamental principles requiring good faith in human private relations, and to the unanimous decisions of the Supreme Court of Spain, the Puerto Rico itself in its former decisions, the English courts and State and Federal courts.

Take, for example, the judgment of the Supreme Court of Spain of May 13, 1903, copied in Appendix II to our Supplemental Brief. The question involved was whether a lender, ''prestamista'', who loaned money guaranteed with a mortgage upon certain property, which appeared in the Registry as belonging to D. Luis Mercader but with knowledge from other sources that D. Luis had sold that property to Don Joaquin, who did not register the deed of purchase, was to be regarded as an innocent third party. The Court simply said ''no''; resting its decision on the effect of notice, and expressing itself as follows:

> ''Considering that the spirit and meaning of section 34 of the mortgage law is not so absolute, according to the repeated jurisprudence of this Supreme Court, as to recognize the status of a third party in him who makes a loan guaranteed with a mortgage upon an im-

movable with notice that the immovable was previously sold by the mortgagor even if this does not appear from the Registry, provided that that knowledge is revealed by acts of the purchaser or in facts whose significance could not be ignored and indicative of assent; because in that case is lacking foundation in law to give to the knowledge of the situation in the Registry any significance; for being one of the principal objects of the law, the publicity of charges, incumbrances and other liens affecting immovables so that nobody could be held responsible for those he ignores, it is unquestionable that according to that law we cannot regard as a third party him who, though having not entered in the act or contract, had knowledge of it, this doctrine being in agreement with principles of law, according to which nobody will be allowed to deny that which he has once accepted without protest or that was either expressly or impliedly consented to."

The above is only one case out of many. In not applying this principle to the instant case, lay the obvious underlying error of the insular Supreme Court in the present case. Respondents' brief falls into the same misconceptions.

Our Supplemental Brief cites the English case of *Le Neve* v. *Le Neve*, 1 Ves. Sr. 64, 66-67, 27 Eng. Rep. 893, a leading case recognizing the effect of actual knowledge of the true facts as supplying a defect in the records of them in Public Registry in every sense. That case states the doctrine in England in regard to cases involving facts and laws analogous to those now subject to discussion. In that case, as in cases in other jurisdictions, Spain included, the Court did not indulge in theoretical considerations other than the mere fact of actual notice. If there is notice, why play the game of the *mala fide* buyer, who is naturally interested in getting the mind of the Court away from the controlling factor of notice into discussions which are immaterial under the existing circumstances and according to applicable principles of public policy.

That is, if a person knows of the existence of a right, it is a matter of public interest that he should be held to

respect that right. It is even immaterial that he is in doubt as to whom the right belongs. Thus the Supreme Court of North Carolina said in *Maples* v. *Medlin*, 5 N. C. 219; 3 Am. Dec. 687, 690:

> "Ray, at the time of his purchase from Curry, was expressly told by the latter that he had sold the lands, and was a mere naked trustee; in truth, that he had nothing to sell or transfer but the mere legal title, which Ray, under this notice, obtained from him. Upon this statement, there can be no doubt but that Ray became a trustee for the complainant, and bound to convey to the *cestui que trust* in the same manner Curry would have been bound. But it is said that Ray had no notice of the particular *cestui que trust*, and that general notice is not sufficient. *We think it is not necessary that he should have notice of the particular* CESTUI QUE TRUST; *it is sufficient if he have notice that the person from whom he buys is but a mere trustee. For he is then informed that he can buy nothing; that the seller has nothing to part with, and that the moment he obtains the legal estate, he becomes a trustee for the* CESTUI QUE TRUST, *be he who he may.*" (*Italics supplied.*)

Respondents knew the option was Mercado's. They tried to beat the option. They did not try to comply with it for the benefit of anybody, either for the benefit of Mercado or of the Tous Soto widow and heirs. What equity do they have, then, to say that, even though they know of, and deliberately planned to beat, the option, they should not be sued to compel compliance with it by the party who, according to respondents' own knowledge, and the Tous Soto widow's and heirs' acceptance, is the real owner of the option. No distortion of contractual obligations can overcome these realities.

A person who contracts an obligation, if refusing to comply, will not be helped by the courts under more or less shallow pretenses to escape with the fruits of his mischief. *Gisselman* v. *Starr*, 106 California 653.

If the intention of the respondents had been to comply with their contractual obligation, and, if they honestly thought the option belonged to the heirs, why did they not comply with their obligation toward the heirs?

They, the heirs, then would have told them who was the real owner of the option. Respondents did not follow this course, naturally, because they knew that the option belonged to the agricultural partnership Mario Mercado e Hijos, and they were bent on usurping it. That is why, when the heirs knew of the infringement, they filed their disclaimer in the interest of justice and for the same reasons and principles recognized in *Gisselman* v. *Starr, supra,* and in an unbroken line of cases covering the same or similar facts.

Coming back to the question of notice, take the Puerto Rican cases cited in our Supplemental Brief. All of them were decided, as the ejectment case between the present parties (*Lluberas* v. *Mercado,* 55 P. R. Rep. 39, *supra*) was decided, upon the controlling question of notice, which prevents the *mala fide* purchaser from taking shelter in speculations upon the provisions of the Civil Code or of the Mortgage Law.

In *Colon* v. *Colon,* 51 D. P. Rep. 95, quoted in our Supplemental Brief, the Court rested its decision entirely upon the question of notice and the actual knowledge that Raul Colon had of the simulated character of the conveyance by his aunt to his father. It was that notice that was the *ratio decidendi* of the controversy. Colon looked for shelter behind theoretical considerations based upon Article 34 of the Mortgage Law. In our case, instead of discussing the effect of notice, the insular Court indulged in theoretical and immaterial observations in regard to provisions of the Code, which were put out of the picture by the overwhelming effect of actual notice.

In *Quintana* v. *Capital of Puerto Rico,* 51 P. R. R. 103, likewise quoted in our Supplemental Brief here, the buyer knew that the Municipality was in possession of the prop-

erty. Quintana had been a resident of San Juan since 1912. He knew that the lot had a school building standing on it for years; he was told that the land was not the property of the seller; yet Quintana wanted the case to turn upon general provisions of the Code and Mortgage Law and on other relatively theoretical considerations. The Court, however, turned him down squarely: Would not let bad faith succeed on such pretenses.

See *Smith* v. *Boughm*, 156 Cal. 359, 104 Doc. 680, and *Chapman* v. *Great Western Gypsum Co.*, 216 Cal. 420, 14 P. (2d) 758, that assignees or mortgagees with notice of option take subject to it. Let us cite another English case, cited in 50 A. L. R. 1321, where it is said:

> "In *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1901) 2 Ch. (Eng.) 37—C.A., it was held that, where a landowner stipulated that he would give the plaintiff the first refusal of his land, he was not free to dispose of the land to an independent purchaser, without informing the holder of the option of the proposed sale, and offering the land to him at such price as the intending purchaser was bona fide willing to give; and that upon failure to make such offer the holder of the option would be entitled to restrain the contemplated breach of the agreement."

And so it was said in another opinion of the Supreme Court of Puerto Rico, in *Pedro Maria Alvarez Lugo* v. *Municipality of Anasco*, 43 P. R. Rep. 498, 504-5:

> "In the first place, the district court concluded, in view of the evidence introduced by the defendant, that the plaintiff had knowledge of the existence of the servitude before he acquired the property, as it was shown that the plaintiff served for three years as alderman in the municipality, was a brother of the previous owner of the property, and maintained business relations with him, and had always resided in the municipal district of Anasco, and in such a case, *in accordance with the repeated jurisprudence of the Supreme Court of Spain and of this Supreme Court of Puerto Rico, the subsequent purchaser is not a third person.*" (*Italics supplied.*)

Although in the foregoing case the action was not brought against the municipality but against the vendor of the property, the principles which served to decide it are fully applicable to the instant case. *Confer*, also, *Roman Catholic Church* v. *Combate Tobacco Corp.*, 42 P. R. Rep. 363.

As regards the jurisprudence established by the Supreme Court of Spain, we will only transcribe one of the findings (*considerandos*) contained in the judgment of April 5, 1898, 84 J. C. 12. It says:

> "Considering that, according to the repeated jurisprudence of this Supreme Court, one has not the status of a third person, for the purposes provided in sections 2, 13, 23, and 27 of the Mortgage Law, invoked in the second ground of this appeal, who acquires property legally encumbered by a servitude the existence of which can not be doubted by reason of ostensible and indubitable signs thereof, even though such servitude be not recorded in the registry, as in such case, the encumbrance being manifest and not hidden, *there is a total lack of the reason on which such legal provisions are founded.*" (*Italics supplied.*)

In all these cases the acts of bad faith were not as strong and obvious as in ours; where respondents are charged with deliberate intent to evade the option. Moreover, see the findings of the Court here (Rec. 479-580) as to the successive execution of deeds by respondents among themselves. On February 25, 1937, Francisco Lluberas acted as mortgagee and Doña Elvira as mortgagor. In the deed of March 8, Lluberas acted as agent of Doña Elvira. In the deeds of March 9, Lluberas became the buyer of Indios and Doña Elvira the seller for the very same amount for which Doña Elvira presumptively mortgaged the estate to Lluberas just eleven days before. It must be kept in mind that Lluberas retained the money of the mortgage of February 25, which was really the sale price of the farm. With it he paid the notes March 8. The day after, March 9, 1937, the estate appeared sold to Lluberas himself for the very same sum of $40,000, for which

it was apparently mortgaged to the buyer only eleven days before. In his testimony, Lluberas admitted that he had been trying to buy "Indios" from Doña Elvira for two years (Rec. 110). Doña Elvira testified that she and the buyer reached an agreement and kept it in secret (See Doña Elvira's admissions to the effect that the sale was agreed to long before March 8, 1937, Rec. p. 381). It is apparent, therefore, that respondents incomprehensibly thought that they could beat petitioner out of the option by keeping the sale in secret and using the sale price for the payment of the notes.

But that method of violating the option was precisely what the terms of the option itself intended to prevent. Let us analyze it.

The option contract (Rec. 4-5) involved in this case may be divided into three parts:

1. The option itself:

> "Seventh: Option to Purchase and Sell and to Lease.—Notwithstanding the foregoing clause, the debtor, as part of the consideration of this contract, agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interests in the estates Indios and Juanita upon the same price and terms."

2. *Modus operandi* of the option:

> "To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any *offer* of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else." (*Italics supplied.*)

3. Consequences of its violation:

> "Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such

sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee."

It is clear, therefore, from the terms of the option itself that the option contract contemplated the possibility of an attempted sale in the manner carried out by respondents; that is to say, by keeping the offer to buy in secret, selling the property and then, with the money of the sale (so kept in secret and retained by the *mala fide* purchaser), paying the mortgage notes. But it is also unquestionable that the option contract provided 30 days from the date of recording of the sale for the partnership to sue the *mala fide* purchaser for the reconveyance of the estate.

It is not alleged or challenged anywhere that the partnership failed to do all it was supposed to do under the terms of the option. The Court, as shown by the findings, found that the partnership complied in every sense.

Respondents, however stress the supposed failure of petitioner to record the reservation of the option. They disregard the effect of actual notice and fall into the same patent error that the Court below fell into when expressing itself thus (Rec. p. 487):

> "If the plaintiff when assigning its promissory notes to the heirs of Tous Soto had expressly reserved to itself the right of option and if when recording the assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them. The record of the original contract in the registry and that of the second contract without any reservation in regard to option, entitled the defendants to proceed as regards the plaintiff in accordance with their construction of the statute. And we have already seen that according to the statute the assignment without reservation of the mortgage notes carried with that of the option. Therefore, if the defendants resolved to assume any risk towards the plaintiff when acting in the way they did, such risk entirely disappeared when the legal percept applicable thereto was established."

The error is self-evident now: As already stated, the Court finding and the facts of record clearly reveal actual notice, which is the best notice that can be given in the world. (See Olivieri testimony, R. 120-121; quoted below.)

Therefore, any discussion or talk about the Registry, which was created precisely to impart notice, is beside the point or immaterial.

We venture to transcribe a short portion of the testimony of the respondent, Francisco Lluberas Passarell, containing significant admissions on which the finding of the District Court quoted above (*ante*, p. 5) and in our original petition for certiorari (p. 10) was based, that all the respondents actually "were advised" (R. 39) "of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates 'Juanita' and 'Indios'."

Mr. Lluberas Passarell said (R. 120-121):

"Q. I am going to put to you now the same question as in the ejectment proceedings of December 20, 1937, before Judge Todd, in the ejectment proceedings instituted by Messrs. Lluberas-Passarell against Mario Mercado e Hijos, and I am reading from the stenographic record in that case: 'Did you know whether Mario Mercado e Hijos held an option to purchase and lease?' Your answer: 'Yes, she had informed me.' Then, she told you, and you ratify such statement?

Mr. Lluberas: She had told me that she was indebted to Mario Mercado e Hijos, and then to Mrs. Belen de Tous-Soto.

Attorney Ochoteco: The question is in reference to Mario Mercado e Hijos, whether she told you that Mario Mercado e Hijos held an option to lease and purchase. This is the question I put to you now. A. That Mario Mercado e Hijos had assigned the same to Mrs. Belen Tous-Soto.

Q. Let us distinguish. One thing is your knowledge, your belief, and another is what Mrs. Elvira Olivieri told you concerning Mario Mercado e Hijos. *The only thing we are interested is whether you knew that Mario Mercado e Hijos held an option to purchase and lease, and whether said question was put to you in that case, and you answered: 'Yes, she had herself told me.' Did she tell you that? A. Yes, probably; of course.*

Q. Did you know that? A. I knew that she was indebted, and that such obligation included an undertaking.

Q. This question made to you just a short while ago, whether you knew it, is the same question I put you in the ejectment proceeding, to which I have been referring continuously, instituted before this court, presided by Judge Roberto H. Todd, Jr., *Hermano Lluberas-Passarell* v. *Mario Mercado e Hijos. My question was this: 'Do you know that?' Your answer was: 'Of course, I knew it.'* Do you ratify that statement?

Mr. Lluberas: If she stated that she was indebted, I knew it, of course.

Attorney Ochoteco: Does the witness remember whether on cross-examination in the ejectment proceedings before this court, presided by Judge Roberto H. Todd, *Lluberas-Passarell, plaintiffs,* v. *Mario Mercado e Hijos* (I am reading from the stenographic record), your attorney in that action, Lopez-de-Victoria, put to you the following question: 'Please tell me . . .' (I am reading from the examination of you by my colleague Lopez-de-Victoria) *'Please tell me, when Mrs. Elvira Olivieri talked with you concerning the estate, and she said that she did not sell because she had granted an option, did she tell you in whose favor was that option?' And you answered: 'In favor of Mario Mercado e Hijos.'* That was your answer. *My colleague said: 'Or of the widow of Tous-Soto?' The answer: "No." 'And in whose favor?' 'In favor of Mario Mercado e Hijos.' 'Not in favor of the widow of Tous-Soto?' 'Not in favor of the widow of Tous-Soto,' you answered.* In order to refresh your memory, please pay attention to what I say, because I am reading from the stenographic record. What I have just read. You can refresh your memory by examining the record.

[The witness examines a record presented to him by attorney Ochoteco.]

Attorney Ochoteco: Did you read again what I had already read to you from the stenographic record?

Mr. Lluberas: Yes, sir.

Q. Can you remember it now, that your memory is refreshed. A. *There is no doubt that I said so in the above case."*

In view of that testimony there can be no question of the meaning of the District Court's finding. Plainly it was not, as respondents now attempt to contend (*Brief*, p. 13) merely a finding that the respondent knew of the original option having been granted by the mortgage deed of March 23, 1932; *but it was a direct finding by the Court that all the respondents actually knew that the Mercado firm still held the option.*

If, however, we were to talk about the Registry, the Court below must be considered as in obvious error since the deed of August 20, 1936, which is the immediate source of Lluberas' title, told Lluberas, by force of law, three things, all leading to indisputable notice:

A. That the partnership, *not the widow and the heirs,* appeared as party to give consent to the partition deed. The heirs appeared nowhere in that deed, though executed over three years after the so much relied on assignment (Rec. p. 225).

B. That nothing was said therein about the assignment of the credits to the widow and heirs.

C. That in clause 18 (Rec. 255-256) it was stated as follows:

> "Eighteenth:—It is stated by the parties herein that the partnership Mario Mercado e Hijos appears in this deed through its attorney-in-fact, Jose R. Peralta, solely and exclusively for the purpose of the consent given by said partnership as interested in the mortgage *credits* above mentioned to the partition of the jointly owned properties carried out therein, but that it does not bind itself by, nor is it responsible for, the stipulations contained in the clauses of the present deed and that, as far as said partnership is concerned, any of said clauses affecting its rights as present lessees of the estates and adjoining property owners of the estate Los Indios shall be held as nonexistent." (*Italic supplied.*)

The deed of August 20, 1936, we repeat, was executed over three years after the assignment relied upon by re-

spondents. Can respondents now honestly say that they did not know what appears in that deed or that they were not bound to attach significance to its contents? In the deed of sale and lease of March 9, 1937, specific mention is made of the deed of August 20, 1936. That deed was recorded. It had to be, before Lluberas' deed could be recorded, though this is immaterial. Respondents, therefore, had, not only actual notice, which is more than sufficient, but also the best constructive notice that could be given of Mercado's claim.

That the Court in its findings refers to the option claim by *Mercado* as existing at the time of the cancellation of the notes, is obvious from the findings of the insular Supreme Court, in the former ejectment or unlawful detainer case, which are reproduced here for the sake of emphasis: *Lluberas* v. *Mercado*, 55 D. P. Rep. 39, 43:

> "We do not wish to reach any conclusion in this case which might affect the decision of the questions on their merits, but we do state that the evidence of the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, *supra*, that they knew that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option."

In the present case, the same Supreme Court said, *Opinion below* (R. 481-482):

> "It also appears to have been shown that both Elvira Olivieri Commins and all the other defendants in cases Nos. 311 and 312 were advised, prior to the execution of the contract of sale and lease, of the right of option purchase and lease held by Mario Mercado e Hijos concerning the estates Juanita and Indios."

We also repeat here for the sake of emphasis an extract from Lluberas and Doña Elvira's testimony. (Rec. 110; Rec. 381):

FRANCISCO LLUBERAS PASSARELL:

"Attorney Ochoteco: When did you show to Mrs. Elvira Olivieri Commins that you were interested in buying the 'Indios' estate?

A. I do not quite exactly remember, but it was long ago.

Q. As regards the date of the purchase, was it on March 9, 1937?

A. A couple of years, perhaps. One or two years; a couple of years at least.

Q. Prior to the signing of the deed of sale? Mr. Lluberas:

A. Yes, sir.

Attorney Ochoteco: When did you first speak to her about your being willing to buy that estate? A. Two years prior to the execution of the sale. At least, the time previously stated. I do not know how long it was, but it was long ago."

MRS. ELVIRA OLIVIERI COMMINS:

"Q. Tell me Doña Elvira, when you sold the estate 'Indios,' were not you demanded to lease the 'Juanita' estate to Millo?

"A. When Doña Elena offered me $40,000.00 for the 'Indios' estate she asked me to leave her the 'Juanita' estate, for the benefit of her daughters, all this as a special concession in the event that she should buy the property. I accepted because in my opinion it was good business, and as I was almost with the rope to my neck, I was broken, as I could not help it . . . I also had my attorney . . .

"Q. Who is your attorney? A. Sabater. Always when necessary he advises us.

"Q. Cannot you remember whether this contract of sale was executed a month prior to March 9, 1937? A. I don't remember whether it was a month or twenty days. . . . Well, I had already given my word. You know I am very honest and my word is always made good. In this I take after my father.

"Q. Then, when you sold the 'Indios' estate, was it on condition that you should lease the 'Juanita' estate, was it on condition that you should lease the 'Juanita' estate? A. Yes, sir. The 'Juanita' estate. I had already given my word."

It is also contrary to logic to make it appear as if the option contract and the negotiable notes contract were one and the same thing. They were simply different contract and though this is not material, please consider the following cases:

> "The Lease and Option to Purchase contained in one instrument constitute separate agreements." *Bennett* v. *Petroleum County*, 288 P. 1018; 87 Montana 436.
>
> "An option to purchase real estate is an unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. By such an agreement the owner does not sell the land, nor does he at the time contract to sell. He does, however, agree that the optionee shall have the right at his election or option, to demand the conveyance in the manner specified. It is merely the right to an election which has been sold, and the owner of this is not bound to complete the sale. *Morgan* v. *Forbes* (1920) 236 Mass. 480, 128 N. E. 792, citing among other cases *Barnes* v. *Rea* (1908) 219 Pa. 287, 68 Atl. 839.
>
> "An option is not a sale of land or an agreement to sell land, and therefore the consideration paid for an option is not consideration for the land. The consideration for the option is a thing apart from the consideration for the sale of the land. An option contract and a contract of sale are in fact two separate and distinct contracts, viz., an option contract and the agreement to sell. *C. C. Slaughter Cattle Co.* v. *Potter County* (1921; Tex. Civ. App.) 235 S. W. 295 (affirmed in (1923; Tex.) 254 S. W. 775)."

In our case, the consideration for the option contract was the acceptance of negotiable notes in payment of a debt due and collectible. The negotiable note contract rested on the consideration of the money loaned. This situation is obvious and any attempt to confuse it by specious argumentation can lead only into more difficulties for respondents.

VI.

There is no possible foundation for respondents' suggestion that Mrs. Tous Soto was guilty in some way of improperly withholding knowledge from her children in purchasing the "bearer" notes in May, 1933, of the reservation to the Mercado partnership of its rights in the option, or of the partnership right to continue to be the one to be asked for consent to any division of the estates between the sisters; or rather that those rights were simply not being purchased from the partnership.

The suggestion is as fantastic as is respondents' suggestion (*Brief*, p. 18) that our original Petition and Supporting Brief "misrepresented" the meaning of the Mercado firm, and not the Tous Soto heirs, having been the one whose "consent" was asked, and formally given, to the partition deed between the sisters, of August 20, 1936, to which reference is made above. (*Confer, ante* "6," "7," pp. 6-9.)

VII.

As above indicated, respondents' brief attempts no real reply whatever to what is said in our original Petition and Supporting Brief, and in our Supplemental Brief, as to the invalidity of Rule 39(b) of the First Circuit Court of Appeals, and as to that Court's misunderstanding of this Court's rule of the respect to be accorded to decisions of Territorial courts of last resort upon questions of local law; or as to the Circuit Court's plain misapplication of this Court's rule in that regard, in the present case.

VIII.

A. Respondents' brief talks about petitioner being a Wealthy land owning agricultural partnership in Puerto Rico holding, as they say, more than 500 acres of land for agricultural purposes, and that it has been sued by the

Attorney General of Puerto Rico[1] for continuing to hold its lands in excess of 500 acres in supposed violation of the Puerto Rico Land Law of 1941,—lands which it acquired long prior to the enactment of that Act by which the Legislature sought to extend to partnerships and unincorporated associations the prohibition against corporation holdings of more than 500 acres of agricultural lands in the Island. The Congressional prohibition was made forty-four years ago by a Joint Resolution of May 1, 1900 (J. R. No. 23, Sec. 3, 31 Stat. 715, 716); but extends to *corporations* only. Whether or not the Legislature of Puerto Rico possesses power to extend it to partnerships and other types of land ownership, and whether or not, in any event, this particular partnership may be said to be within the purview of the Legislature's Act of 1941 is immaterial here. That legislation was all long after these transactions, whic,h culminated in 1937. In any event, no one but the Attorney General of Puerto Rico could question the rights of this petitioner partnership to its land or contracts, including its right under this option contract of March 23, 1932.

B. Respondents say, and repeat (Brief, p. 11) that Mrs. Olivieri Commins was "forced" into the March 23, 1932, transaction with the Mercado partnership and the giving of the option to permit them to purchase the land, or to renew their leases, on the same terms anyone else might offer.

But there is not a word anywhere in the record to support that charge. To the exact contrary, this seven year loan of something more than $40,000, made to her by this agricultural firm, at the time of the depth of the financial depression, appears liberal. This Court may take judicial notice of that depression and that it was as acute in Puerto Rico as in the mainland. The Mercado

[1] Along with other sugar producing firms and partnerships. It is not one of those of the first magnitude in Puerto Rico.

firm were not bankers, but nevertheless they granted this seven year loan, to Mrs. Olivieri Commins at a usual going rate of interest in Puerto Rico, without requiring any annual reductions of the principal or any other conditions except only that if she should desire to sell the property, or to lease it again at the expiration of the ten year leases of it then held by the partnership, she would let the partnership have an opportunity to buy it, or to renew its leases, on the same terms anyone else might offer.

CONCLUSION.

The judgment of the Supreme Court of Puerto Rico affirming that the District Court of Ponce was clearly wrong, and should be reversed; and the action or judgment or order of the Circuit Court of Appeals for the First Circuit, dismissing, under its Rule 39(b), the appeal to it, and affirming the judgment of the insular Supreme Court *pro forma*, without full hearing and argument, was likewise erroneous and a deprivation of petitioner-appellant's constitutional rights to due process of law and to the equal protection of the laws, and should likewise be reversed, and this case remanded to the District Court with directions to vacate its former judgments and to enter judgment in favor of the plaintiff-petitioner, Mario Mercado e Hijos.

Respectfully submitted,

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APPENDIX

APPENDIX I.

(Testimony of E. Olivieri-Commins)

"Attorney Ochoteco: I beg the court to bear with me on account of the lengthy examination, but I am examining on the basis of a memorandum before me. When Mr. Chito Lluberas lent to you the $45.000, was it not on the condition that the lien on account of the principal be prorated between the two estates, that is, that the $45,000 be split, upon the two estates, as security, proportionately to the $45,000?

Mrs. Olivieri: I gave him the mortgage because he had given me the money.

Q. Did not he suggest to you to distribute the lien? A. No, I do not think so. I do not remember.

Q. When did yon do that? A. I mortgaged to him all my land for $45,000, and that is all I remember; that is all I understand.

Q. Tell me, madam. In the sale from you to Messrs. Lluberas of one of the estates on March 9, 1937, by deed number 40 executed before notary Luis Lopez-de-Victoria, it is stated that the consideration of the sale is $40,000. This amount is admitted by Mrs. Elvira Olivieri-Commins as having been received from the purchaser before this act to her entire satisfaction, and for which sum, etc. The $40,000 which you admit to have received as the purchase price of your estate, was it not part of the $45,000 lent to you by Mr. Lluberas on a mortgage?

Mrs. Olivieri: Yes, sir. It was part because the amount was 45—

Attorney Ochoteco: Exactly. In other words, out of the $45,000 of the mortgage of Mr. Lluberas, $40,000 were paid by you to him as the purchase price of these estate, there being $5,000 short to be paid to you? A. Yes, sir. And I mortgaged to him the estate 'Juanita'.

Q. Was it so? A. Yes, sir.

Q. Tell me, madam, why did you decide to cancel the mortgage of the widow of Tous-Soto in order to execute another one in favor of Messrs. Lluberas, instead of continuing that of Mrs. Tous-Soto, which had not become due? A. Because the mortgage interest to be paid to her was 9 per cent, whereas the mortgage to Lluberas was 8 per cent, and I had the advantage that it would have been easy for

me to pay him even at 7 per cent, because we were good friends."

"Attorney Ochoteco: Then the mortgage of the widow of Tous-Soto was bearing 9 percent and the mortgage to Lluberas was going to bear 8 percent?

Mrs. Olivieri: Yes, sir.

Q. Was it 1 percent the profit you were going to make? A. Yes, sir.

Q. Then, madam, in order to make up your mind to pay the mortgage to the widow of Tous-Soto and to borrow the money from Mr. Lluberas so as to profit by 1 per cent, you had figured and knew that you were going to be benefited by 1 percent? A. Yes, sir.

Q. Did you know that you had to pay her three installments of interest in advance by reason of the premature cancellation of the mortgage? A. I figured. I figured because 9 percent is not the same as 8 percent. I thought first: 'May be later on he will reduce the rate of interest to seven.'

Q. Did you take into account the cost to you of the cancellation of the mortgage to the widow of Tous-Soto, and the execution of the new mortgage, and record thereof in the Registry of Property?

Mrs. Olivieri: I did not give much thought to that.

Attorney Ochoteco: You stated that one further reason for substituting the mortgagee was that Mr. Lluberas was related to you?

A. He is not related to me, but a close friend of mine.

Q. Do you consider each other as related? A. Yes, sir. In great mutual regard.

Q. A friendship, of how many years? A. A great many years.

Q. More or less? A. I do not know. Think of it, before he was born.

Q. At least, a friendship of 50 or 60 years? A. Almost.

Q. Tell me, madam. For the purpose of that substitution, you were borrowing from Mr. Lluberas $45,000 on a six-month mortgage. Do you realize that you were going to cancel a mortgage that had not yet become due, and substitute for it one to Mr. Lluberas for six months? A. I borrowed that money for six months, it is true, but always in due hope that he would extend the time at a lesser rate of interest. And that is why I borrowed that money from him in order to pay the widow of Tous-Soto.

Attorney Ochoteco: We know already that, but how can you explain away the borrowing of that amount for six months ($45,000 for six months), after which period the mortgage credit would have become due, and then to find yourself after six months with a mortgage credit already due for $45,000?

Mrs. Olivieri: In the hope that subsequently he would reduce the rate of interest. I am sure he would have accommodated me.

Q. Madam, when you received the $40,000 from Mr. Lluberas by virtue of the sale made to him of one of your estates, there was the sum of $5,000 short, and that $5,000 according to you were lent by him on a mortgage on some other estate? A. Estate 'Juanita'.

Q. At the rate of per cent and for five years? A. Yes, sir.

Q. And why did not you, when you executed the mortgage for $45,000, make that mortgage for five years, instead of for six month, at 6 per cent, instead of at 8 per cent, and on the other hand, when the sum was $5,000, you made it for five years?

Mrs. Olivieri: Will you please explain. I do not quite follow you.

Attorney Ochoteco: Of the $45,000 from Mr. Lluberas, $40,000 were for the sale of the estate "Indios". Then the balance of $5,000, up to $45,000, is secured by you with a mortgage upon the estate 'Juanita', for five years, at the rate of 6 per cent annually. A. Yes, sir.

Q. Was it not so? A. Yes, sir.

Q. Now, the question is as follows: why, when a $5,000 mortgage is involved, did you execute such mortgage for five years at 6 per cent, and on the other hand when a $45,000 mortgage is involved you executed the mortgage for six months at 8 per cent? A. I will tell you. At the time of the execution of the mortgage for $45,000, I always hoped that he would reduce (the rate of interest), and always with the idea of borrowing such amount and pay, and this is proven by the fact that he was so liberal that he executed to me the 'Juanita' mortgage and brought down the interest to 6 per cent.

Q. The five-year mortgage?

Mrs. Olivieri: Yes, sir, and if I had asked him 20, he would have allowed me 20.

Attorney Ochoteco: But you did not ask him a 2-year mortgage when you borrowed from him the $45,000?

A. At that time—"

APPENDIX II.

Testimony of M. Francisco Lluberas—Extract.

"Attorney Ochoteco: Why is it that if what you were doing was an investment, a loan transaction whereby you were lending $45,000 to Mrs. Elvira Olivieri-Commins; why did you, when prorating the lien to be borne by the estates burdened by the debt, burdened the estate 'Indios' with $40,000, and the 'Juanita' estate with $5,000 only, if the 'Indios' estate was worth $40,000, and the 'Juanita' estate more than $25,000?

Mr. Lluberas: I understood that both estates were going to be given as security for the indebtedness, the payment of my loan; and the attorney who made the prorating had my full confidence and he did it that way; perhaps because it was more convenient for the notary, or the registry or for any other reason.

Q. Tell me, please, is there any other explanation that the witness might furnish, which is not that? Any further explanation other than that? A. I think this is the only explanation that fits the case.

Q. You, and I have in mind the date when you effected that purchase, on or about the 9th of March, 1938, and at the time of the trial of the ejectment suit, of which we know; the date about the 20th of December, 1937; about March 9, 1937, had you ever executed any mortgage in your life?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: And were you at that time as solvent as you are at present? A. I think so.

Q. And did you know at that time the meaning of a loan secured by mortgage? A. Of course.

Q. Because you had already made other deals regarding mortgages? A. Yes, sir.

Q. What was your age, or how old were you in 1937? Pardon my insistence as to the age. A. I was two years younger than now; a little less than 38.

Q. Between 37 and 38, more or less? A. Yes, sir.

Q. About 1937, had you been for several years in important business? A. Yes, sir.

Judge: Less than 38 years old means that you were then between 37 and 38?

Mr. Lluberas: Near 38.

"Attorney Ochoteco: Please tell me: as you were, in or about March, 1937, a business man, an age of discretion, who had lent out money on mortgages, and a considerable sum being involved, $45,000 for instance, you did not see to it that the $45,000 were evenly distributed between those two estates, considering the liability of each estate, so that the two estates should answer for the $45,000 proportionately to their value? A. The estates covered the amount of the indebtedness; the payment of the debt.

Q. Was one answerable for $5,000 and the other for $40,000? A. Yes, sir.

Q. Why did not you see to it that they were answerable, that they were proportionately balanced, if you were a business man, proportionately to the value of each of these two estates, but instead you made one of the estates answer for $40,000 and the other estate, which according to you is worth $25,000, answer for $5,000 only? A. That did not matter.

Q. Why did not it matter? Did not you want to secure your money?

Mr. Lluberas: Yes, sir.

Attorney Ochoteco: At the maximum, on a 100 per cent security? A. I considered it well secured at a 100 per cent, as we did."

Q. You had testified that the 'Indios' estate, bought afterwards by you and your sister, was worth $40,000? A. Yes, sir.

Q. If the estate was worth $40,000 and you made it to answer for a sum equal to its value, and allow the 'Juanita' estate to answer for $5,000; was not it better to prorate such amount between the two, if one is worth $40,000 and the other is worth $25,000? Then, proportionately, let us put it, for example, that one estate should answer for $25,000 and the other for $20,000, or one for $15,000 and the other for $30,000? A. Because by the way it was done, I considered the investment to be secured.

Q. Then, you bought that estate which secured $40,000, precisely for that $40,000? A. Yes, sir.

Q. And you, in order to invest $45,000, which is a very respectable amount—at least to me—was it so to you?

Mr. Lluberas: Also, very respectable.

Attorney Ochoteco: To me that amount of $45,000 is a very respectable sum. Did you not, before investing such amount, go and see those estates, in order to ascertain their

value? A. The estates were mortgaged for $41,000, and I deemed it unnecessary to go and look at the 'Juanita' estate, in view of the fact that I knew what the two estates were worth, and what another investor would have advanced for the two estates.

Q. If I understood correctly—please correct me if I am mistaken—did you rely on the judgment of former mortgagees? A. Yes, sir.

Q. Did not you go and look at the 'Juanita' estate? A. No, sir.

Q. Tell me, Mr. Lluberas, as you relied on the financial view point of former mortgagees as to the value of the 'Juanita' estate and as to the value of the 'Indios' estate, did you rely on that financial viewpoint as to the prorating of the mortgage liability? Did you prorate it in the same way as the former mortgagee; did you follow such viewpoint?

Mr. Lluberas: I have stated before that the attorney made the prorating of the valuation of the two estates.

Attorney Ochoteco: For the purpose of properly explaining my weighing of your testimony—and if my interpretation is wrong, please correct me. And you, who were going to invest $45,000 on two rural estates, who relied as to the final security on the judgment of a former mortgagee—please correct me if I am mistaken—was this so? A. Yes, sir.

Q. Do you state to me that as regards the prorating of the liability between the two estates, you allowed yourself solely and exclusively to be guided by the honest judgment of your attorney? A. Exactly.

Q. Of attorney Luis Lopez-de-Victoria? A. Exactly.

Q. And you, who were going to part with $45,000, a respectable sum according to you, you delegated to the notary the responsibility of prorating such amount, having followed the judgment, as to the investment, of the former mortgagee, for the prorating of the security? A. I accepted the prorating made by the attorney.

Attorney Ochoteco: And why did not you take the trouble; did not make the effort, did not act on your own initiative, as a man of business, as you have stated, the business of lending money on mortgage, did not make the prorating yourself, and you told the notary to make such prorating himself?

Mr. Lluberas: Because the 'Indios' estate adjoins our property, and by appraising the other at $5,000 I considered that the money was well secured, without the necessity of entering into further details.

Q. Did you know that that estate was worth $40,000? A. Yes, sir, and some more.

Q. Was it worth more than $40,000? A. At that time, and subsequently I would have rejected an offer of $60,000.

Q. Irrespective of such considerations, which have no bearing on the suit. A. The value of the estate is relative.

Q. You have testified that this estate (and I am now confining myself to your previous testimony), that that estate was worth $40,000; did not you call the notary's attention when you saw that he had set down $40,000 as the value of one estate and $5,000 as the value of the other? When making the deed, did you read the mortgage deed before affixing your signature to it?

M. Lluberas: Of course.

Attorney Ochoteco: Did not you call the notary's attention to it? A. I did not.

Q. Did not you ask him the reason why he made such prorating? A. It was immaterial. Such prorating in this case was immaterial."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 497

MARIO MERCADO E HIJOS,

Petitioner,

vs.

ELVIRA OLIVIERI COMMINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUGGESTIONS OF RESPONDENTS ELVIRA OLIVIERI COMMINS, MANUEL FRANCISCO LLUBERAS, ETC., IN OPPOSITION TO PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF SUGGESTIONS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 497

MARIO MERCADO E HIJOS,

Petitioner,

vs.

ELVIRA OLIVIERI COMMINS, MANUEL FRANCISCO LLUBERAS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUGGESTIONS OF RESPONDENTS ELVIRA OLIVIERI COMMINS, MANUEL FRANCISCO LLUBERAS, ETC., IN OPPOSITION TO PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF SUGGESTIONS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Introductory.

Defendants Elvira Oliveri Commins, Manuel Francisco Lluberas and his wife Hazell Kelly Lluberas, Antonia Lluberas Passarell, Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio

Valenti Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti, and Raquel Lluberas Passarell, hereby make opposition to the petition of Mario Mercado e Hijos, a partnership, for a writ of certiorari to review the judgment that was rendered by the Circuit Court of Appeals for the First Circuit on August 23, 1943 (Rec. p. 518), dismissing the appeal taken by said partnership from the judgment that the Supreme Court of Puerto Rico rendered on July 31, 1942 (Rec. p. 488), affirming the judgment of the District Court of Ponce of April 9, 1941 (Rec. p. 45):

(1) Because the said judgment is correct, as it is sustained by the oral and documentary evidence in the case as weighed by the District Court of Ponce;

(2) Because the law was correctly applied; and,

(3) Because the appeal so taken is frivolous and, furthermore, academic.

Opinions of the Courts Below.

The opinion of the Insular District Court of Ponce (Statement of Facts, Opinion and Judgment, Rec. pp. 31-44). The opinion of the Supreme Court of Puerto Rico, affirming the District Court is reported in 60 D. P. R. 877-890 (Spanish edition). It has not yet appeared in the English edition of the Puerto Rico Reports. The judgment of the Circuit Court of Appeals, affirming that of the Insular Supreme Court (Rec. 518).

Jurisdiction.

Jurisdiction exists in this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

Question Presented.

By its petition for a writ of certiorari before this Court, partnership Mario Mercado e Hijos aims to annul Rule 39

of the First Circuit Court of Appeals as it was revised and adopted by the latter court, effective September 20, 1940. This rule has its source in the decision rendered by this Honorable Court in the case of *Sancho Bonet, Treas.* v. *The Texas Co.*, 308 U. S. 463, 470-472 (Petition, p. 2).

The manner in which the validity and extent of that Rule is attacked shows that the purpose of petitioner is none other than a revision by this Court, on its merits, of the judgment that the District Court of Ponce rendered in the instant case dismissing petitioner's complaint, judgment that was affirmed by the Supreme Court of Puerto Rico, (*Mario Mercado e Hijos* v. *Olivieri*, decided on July 31, 1942 and reported in 60 D. P. R. 877-890 (Spanish edition)). It thus appears from the arguments adduced in petitioner's brief and from the prayer therein (Petition, page 20).

We anticipate that the judgment aforesaid was rendered by the District Court of Ponce after it had weighed all the evidence adduced by the parties in the suit and after it had decided the conflicting testimonies of the witnesses of both parties therein in favor of the defendants (Rec. pp. 31-44).

The general doctrine is that unless passion, partiality or prejudice is shown, none of which have been alleged nor shown by your petitioner, a judgment will not be reversed by the appellate court. The errors assigned by the petitioner are imaginary and do not exist.

Statement.

On March 23, 1932, the petitioning partnership Mario Mercado e Hijos, and the codefendants Elvira Olivieri Commins, the opponents herein, executed deed No. 13, before Notary Public Fernando Zapater Martínez. By that deed Elvira Olivieri Commins acknowledged to be indebted to the said partnership in the sum of $41,256.89, and, in payment thereof, the said Elvira Olivieri Commins issued, subscribed and delivered to the partnership Mario Mercado e

Hijos four promissory notes, three of them for the sum of $10,000.00 each, and the fourth for the sum of $11,256.89, the payment of which promissory notes she secured with a mortgage on her share in the properties known as "Indios" and "Juanita", located in the municipality of Guayanilla, Puerto Rico, jointly owned by her and her sister Santia Olivieri Commins (Rec. 225). Both properties aforesaid were at that time leased to the partnership Mario Mercado e Hijos (Rec. 227).

The seventh clause of the said mortgage contract states as follows:

> "Option to Purchase and Sell and to Lease.—Notwithstanding the foregoing clause, the debtor, *as part of the consideration of this contract*, agrees with the partnership Mario Mercado e Hijos, *so long as the mortgage credit herein constituted is not paid*, to grant it priority to purchase and sell or lease her undivided joint interests in the estates 'Indios' and 'Juanita' upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee" (Rec. p. 327).

The four promissory notes secured with the mortgage referred to were later on endorsed and conveyed or assigned by the partnership Mario Mercado e Hijos to the Heirs of José Tous Soto, four of which heirs were then minors and one was an incapacitated person, as it appears from the

records of the proceedings for judicial authorization filed in the District Court for the Judicial District of Ponce, wherein the said minors and incapacitated person were domiciled (Exhibits 1 for defendants, Rec. pp. 384-396), pursuant to the provisions of Sections 80, 81 and 82 of the Special Legal Proceedings Act (Sections 614 and 616 of the Code of Civil Procedure (1933 ed.), *Longpré* v. *Díaz*, 213 U. S. 512, cited with approval in *Zayas* v. *Torres*, 51 P. R. R. 772, 776).

In the conveyance and assignment aforesaid the following wording is used:

> "Mr. Mario Mercado y Montalvo, as the sole managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, hereby *conveys, renounces and assigns* in favor of Mrs. Belén González, widow of Tous, in the representation in which she appears in this execution and *in her own right*, and to Doña Ana Rosa Tous de Carrión, Doña Luz Belén Tous de Usera, Doña Alicia and Doña Celia Tous y González, the mortgage credit constituted by the deed above transcribed, *the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act* and in my presence and that of the witnesses the four mortgage promissory notes above mentioned duly endorsed, to all of which, I, the notary, certify" (Rec. 406).

Neither in the petition for judicial authorization before the District Court of Ponce, nor in the judgment rendered in the said judicial authorization proceedings (Rec. pp. 393-396), nor in the deed whereby partnership Mario Mercado e Hijos conveyed and assigned to the Heirs of José Tous Soto the said promissory notes and the mortgage securing them (Rec. pp. 397-412), is there any statement whatever to the effect that the partnership Mario Mercado e Hijos had reserved any rights over the "Option to Purchase and Sell

and to Lease" clause. Neither Elvira Olivieri Commins nor any of the other codefendants were a party to, or participated in, the said judicial proceedings or in said deed.[1]

Not even in the registry of deeds, where the assignment of the mortgage credit was recorded, appears the alleged inexistent reservation of rights to the "Option to Purchase and Sell and to Lease" clause as claimed by the Partnership Mario Mercado e Hijos (Exhibit "9" for defendants. Rec. pp. 470-471). Nowhere in the notice of the assignment, served by Notary Public Fernando Zapater on Elvira Olivieri Commins pursuant to the provisions of Section 152 of the Mortgage Law and Section 185 of the Regulations for the Execution of the said Mortgage Law, was the referred to Elvira Olivieri Commins informed that the partnership Mario Mercado e Hijos had reserved any right over the "Option to purchase and sell and to lease" clause above mentioned.[2]

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[1] "The contracting parties cannot by stipulation limit the scope of the terms of the contract without the consent of a third person, who participated in the agreement by approving it and without whose intervention and approval the contract would not have been made.

"In construing a stipulation, a court cannot add to the scope thereof by extending it beyond its own terms and the intention of the parties." *Caribbean Eng. Co.* v. *Municipality*, 60 P. R. R. 26.

[2] "Art. 152. A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry.

"The debtor shall not be bound by said contract to any further extent than he was by his own.

"The assignee shall be subrogated to all the rights of the assignor." Article 152 of the Mortgage Law.

"Art. 185. Before recording the assignment of a mortgage credit, the debtor shall be advised, unless he shall have waived the right to notice in a public instrument, or if such a case as that mentioned in article 153 of the law should be involved, by means of a notice to be drawn and signed by the notary who may have authenticated the deed, stating therein merely the date of the assignment, the fact of the same being total or partial, and in the latter case the amount assigned, and the name, surname, residence, and occupation of the asignee. The notary shall serve or cause this notice to be served upon the debtor.

On March 4, 1937, Belén González widow of Tous Soto, as mother with *patria potestas* over her minor children and as guardian of the incapacitated one named José Tous González, appeared before the District Court of Ponce by her attorney Fernando Zapater Martínez, who was then likewise attorney for the partnership Mario Mercado e Hijos (Rec. pp. 183-184), requesting judicial authorization from the said Court in order to cancel in full the mortgage that had been constituted to secure the said four promissory notes that the partnership Mario Mercado e Hijos had conveyed and assigned to and belonged to the Heirs of José Tous Soto (Exhibit "4" for defendants, Rec. pp. 425-451). Nowhere in the record of the above proceedings, nor in the judgment rendered by the district court therein (Rec. pp. 448-451), does it appear that the Heirs of José Tous Soto or any of them, or the District Court of Ponce, had admitted that partnership Mario Mercado e Hijos *had reserved any right whatsoever over the "Option to Purchase and Sell and to Lease"* clause.

On March 8, 1937, before Notary Public Fernando Zapater Martínez, the Heirs of José Tous Soto executed deed No. 47 whereby the above-mentioned heirs received then and there the amount of $41,256.89 representing the total amount of the four promissory notes and cancelled in full the mortgage securing said notes. The mortgaged properties known as "Indios" and "Juanita" belonging to the defendant Elvira Olivieri Commins, were thus freed from the mortgage encumbrance (Exhibit "I" for plaintiff; Exhibit "5" for defendant, Rec. pp. 312-321). Partnership Mario Mercado e Hijos, which had voluntarily and for

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"If the debtor should not be found at his residence, service shall be made in the form prescribed for summonses in the first paragraph of article 268 of the Law of Civil Procedure for Cuba and Porto Rico, and 252 of that for the Philippines." Article 185 of the Regulations for Execution of the Mortgage Law.

its sole benefit parted with the possession of the said promissory notes and of the mortgage securing them since March 9, 1933 (Exhibits 2 and 3 for defendants, Rec. pp. 397-424), did not intervene therein.

On March 9, 1937, as per deed No. 40 of that date before Notary Public Luis López de Victoria (Exhibit "D" for Plaintiff, Rec. pp. 260-268), Elvira Olivieri Commins sold the "Indios" property to the codefendants Lluberas Passarell. At that time, the mortgage securing the four promissory notes that had originally belonged to Mario Mercado e Hijos and since 1933 had belonged to the Heirs of José Tous Soto did not exist, for due to the payment made to the said heirs of the full amount of the four promissory notes, they had totally cancelled the mortgage securing them on March 8, 1937 (Rec. 312-321).

Elvira Olivieri Commins was under no obligation to notify neither the petitioner Mario Mercado e Hijos nor the Heirs of José Tous Soto of her decision to sell or to lease her properties known as "Indios" and "Juanita", respectively. The "Option to Purchase and Sell and to Lease" clause, together with the mortgage of which the said clause formed a part of, had already disappeared and had no legal existence and, therefore, the petitioner Mario Mercado e Hijos could not complain of any fraud nor bring the instant suit on the ground of an alleged fraud based on imaginary or supposed rights which did not exist.

The opportunity which the partnership Mario Mercado e Hijos had to purchase or to lease the "Indios" and "Juanita" properties was lost through its own voluntary acts. The fact that Mr. Barletta, a relative and an agent of Elvira Olivieri Commins, had attempted to sell or to lease the said properties to Mario Mercado e Hijos at about the same time that Elvira Olivieri Commins was personally selling her property "Indios" to the Lluberas-Passarell brothers and leasing the "Juanita" property to Emilio

Blasini Totti, gave no right whatsoever to the partnership Mario Mercado e Hijos.. Moreover, from the said licit acts neither fraud nor conspiracy can be inferred. Mr. José R. Peralta, manager of the petitioning partnership was present at the office of Fernando Zapater, the attorney for Mario Mercado e Hijos, when Manuel Francisco Lluberas, acting for Elvira Olivieri Commins was negotiating the payment of the amount of the four promissory notes to the holders thereof, i.e. to the Heirs of José Tous Soto, as well as the cancellation by the latters of the mortgage securing said notes (Rec. 140-145).

Nowhere in the Registry of Property did the said "Option to Purchase and Sell and to Lease" continued in full force and effect in favor of any one person, after the mortgage had been cancelled (see Exhibit "5" for defendants, Rec. p. 312; Exhibit "9" for defendants, Rec. pp. 470-471. See also Sections 1 and 2, and 24-50, inclusive, of the Mortgage Law).

What right, if any, had partnership Mario Mercado e Hijos on April 8, 1937, i.e., three years, ten months and twenty-eight days after it had parted with the four promissory notes and with the mortgage securing them, to bring a suit alleging conspiracy and fraud and asserting supposed rights under the "Option to Purchase and Sell and to Lease" clause contained in the mortgage deed (Exhibit "J" for plaintiffs, Rec. 322-329), which mortgage Mario Mercado e Hijos had conveyed and assigned to the Heirs of José Tous Soto on March 9, 1937 (Exhibit "2" for defendants, Rec. 397-411)?

A chronological statement of the facts can be found in Appendix II, appearing at the end of this brief (Infra, pp. 62-70).

The fact that partnership Mario Mercado e Hijos and its managing partner Mario Mercado Montalvo in his private capacity had bound themselves as joint sureties or had as-

sumed certain obligations in behalf of the Heirs of José Tous Soto in the deed whereby Mario Mercado e Hijos had conveyed or assigned to the said heirs the mortgage credit owned by Elvira Olivieri Commins, to wit, to guarantee the payment of the monthly interest and the taxes levied upon the mortgaged properties when becoming due, did not create any right in favor of the partnership Mario Mercado e Hijos over the "Option to Purchase and Sell and to Lease" that it had conveyed and assigned by the said deed. Such obligations were assumed by said partnership in consideration that it kept and received for itself a commission of three-fourths of one *per cent* of the interest yielded by the principal owed. Elvira Olivieri Commins was not a party to the deed whereby the mortgage credit was so conveyed and assigned [3] and the contracting parties thereto were at liberty to fix the conditions they deem most advisable. (Sections 1044 and 1207, Civil Code, 1930 ed.).

The will of the parties, as evinced from the contract, should the latter be valid, is the law of the case. 19 Scaevola 674; 8 Manresa 669 (1929 ed.); 20 Scaevola 882, 912; Judgment of the Supreme Court of Spain dated April 17, 1873, 27 *Jurisprudencia Civil* 592; *Wade* v. *Texarkana Bldg., etc.*, 233 S. W. 937; *New Richmond Land Co.* v. *Ivanovich*, 198 Pac. 221; *Spokane Canal Co.* v. *Coffman*, 103 Pac. 1106.

The foregoing paragraph is taken from *Clausells* v. *Salas*, 51 P. R. R. 87, 91.

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[3] In *Caribbean Engineering Co.* v. *Municipality of Ponce*, 60 P. R. R. 26, the Supreme Court of Puerto Rico held:

"Contracts—Modification—Right to Modify.—The contracting parties cannot by stipulation limit the scope of the terms of the contract without the consent of a third person, who participated in the agreement by approving it and without whose intervention and approval the contract would not have been made.

"Stipulations—Construction, Operation and Effect.—In construing a stipulation, a court cannot add to the scope thereof by extending it beyond its own terms and the intention of the parties."

In the same way that Mario Mercado e Hijos had fixed those conditions in the deed whereby it conveyed and assigned the mortgage credit, with a view to making a profit of three-fourths of one *per cent* on the interest yielded by the principal, it could as well have also set down therein the condition that it reserved the rights under the "Option to Purchase and Sell and to Lease" clause contained in the mortgage deed. If being in a position to then and there fix such a condition, Mario Mercado e Hijos failed to do so, it has to abide by the consequences of its own act or conduct. In weighing the evidence and refusing to give any probative force (Rec. 42) to Exhibits "E" and "F" for plaintiffs (Rec. 281-302), the District Court of Ponce complied with the law. Petitioner's stand in complaining of such an action on the part of the trial court, is childish (Petitioner's brief pp. 12-13).

The sale made by Elvira Olivieri Commins of her "Indios" property to the defendants Lluberas-Passarell, and the lease by her made of the estate "Juanita" to codefendant Emilio Blasini Totti, was not a friendly or family affair. It was a licit transaction. Elvira Olivieri Commins was free to dispose of her properties, and defendants Lluberas-Passarell and Blasini, were at liberty to purchase and to lease the said properties as they did, as nothing appeared from the records in the registry of property of Ponce preventing them from so doing. Any hidden agreement between Mario Mercado and the Heirs of José Tous Soto could not be binding on any other person. (Exhibit "9" for defendants, Rec. 460-472.) *Nuiskamp* v. *Tagin Co.*, 121 U. S. 310, 319, 30 L. Ed. 971. Partnership Mario Mercado e Hijos imposed upon the mortgagor the "Option to Purchase and Sell and to Lease" clause in the mortgage deed, moved by its eagerness to acquire and control lands in excess of the 9520 acres which said partnership already owned and controlled as it appears from the suit brought

by The People of Puerto Rico, for a violation of the agrarian policy of this Island. Act No. 26 of 1941; *People of Puerto Rico* v. *Rubert Hermanos*, 309 U. S. 543, 84 L. Ed. 916; *People of Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 480-482.

The petitioner can not acquire at present, either as owner or for its control, the "Indios" property composed of more than 400 acres of land, nor could it control through lease the "Juanita" property composed of more than 450 acres, since Joint Resolution of Congress, approved on May 1, 1900 (31 Stat. at Large 715, supplementing the Foraker Act of April 12, 1900, 31 Stat. at Large 77, Chap. 191) and Section 58 of Act No. 26, approved by the Legislature of Puerto Rico on April 12, 1941, as amended by Act No. 160, approved on May 14, 1943 (Session Laws of that year, page 520), expressly forbids said partnership to do so. (See Appendix 1, at end of this brief); even though Mario Mercado e Hijos claims were lawful, and we maintain they are not, the remedy by certiorari would be academic, inasmuch as the said Joint Resolution of Congress and Section 58 of the Land Act in force in Puerto Rico expressly prohibits any partnership or corporation dedicated to agriculture to own or possess lands in excess of 500 acres.

District Court's Opinion.

Very skillful, indeed, but without any foundation in law, are the arguments adduced by petitioner on commenting the opinions of the District Court of Ponce and that of the Supreme Court of Puerto Rico.

The "Statement of the Case" and the "Findings of Fact" (Rec. 31-44) comply with the provisions of law in force in Puerto Rico. The District Court of Ponce omitted nothing that was necessary to make itself clear or understood considering the evidence adduced by the parties to the suit and statute or statutes applicable thereto. If

plaintiff, the petitioner herein, did not agree with the findings in the "Opinion and Statement of the Case" of the said district court as well as with those in the opinion of the Supreme Court of Puerto Rico, it should have asked that said findings and judgments be broadened, modified or reconsidered. Plaintiff failed to do so, and cannot now ask that it be protected from its own fault or negligence.

The argument employed by petitioner is ridiculous when it repeatedly says in its brief as follows:

> "All the respondents were advised of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates 'Juanita' and 'Indios' ". (Brief 10-14.)

It is true that the defendants knew that the partnership Mario Mercado e Hijos had the right, under the option, to purchase and to lease the "Indios" and "Juanita" properties belonging to Elvira Olivieri Commins, but they also knew, and so they testified to it in the District Court of Ponce, that the referred to partnership Mario Mercado e Hijos had alienated those rights on conveying and assigning to the Heirs of José Tous Soto the four promissory notes and the mortgage securing them. (Rec. 90-93, 102-103, Olivieri Commins' testimony; Rec. 110-122, Lluberas' testimony.)

The District Court of Ponce gave to the deed conveying and assigning the mortgage credit the true probatory value that it had (Exhibit "2" for defendant, Rec. 397-411) as well as to the notice that the attorney for Mario Mercado e Hijos had served on Elvira Olivieri Commins of the conveyance and assignment of the said mortgage credit (Exhibit "3" for defendant, Rec. 412-413). That notice was served in pursuance to the provisions of Section 162 of the Mortgage Law and of Section 185 of the Regulations for its Execution to the effects contemplated by Section 187

of the said Regulations for the Execution of the Mortgage Law.

The petitioner speculates on and misrepresents the intervention that partnership Mario Mercado e Hijos had in the division or partition of the "Indios" and "Juanita" properties between Elvira Olivieri Commins and Santia Olivieri Commins, as per deed No. 33 of March 20, 1936 (Exhibit "A" for plaintiff, Rec. 255-256). Such intervention is explained by the fact that, at that time, the partnership Mario Mercado e Hijos was the mortgage creditor of Santia Olivieri Commins, that the shares which the referred to Santia Olivieri Commins had in the "Indios" and "Juanita" properties were mortgaged to that partnership, and that in this mortgage contract Mario Mercado e Hijos had forced upon the mortgagor a clause similar to the option to purchase and sell and to lease clause contained in the mortgage contract entered into between Elvira Olivieri Commins and Mario Mercado e Hijos (Rec. 227-236). As far as Santia Oliviero Commins was concerned, the intervention of the partnership Mario Mercado e Hijos in the said deed of partition was a legitimate one, but it was not so as far as it concerned Elvira Olivieri Commins who owed nothing at that time to Mario Mercado e Hijos.

A thorough study and consideration of all the questions involved in this case on the part of the Supreme Court appears from the facts to which petitioner refers on pages 11 and 13 of its brief (Rec. 375-388).

The Honorable Roberto H. Todd, Jr., the judge who presided over and rendered judgment dismissing the complaint in an unlawful detainer suit brought by the plaintiff before the District Court of Ponce in 1937, and which judgment was affirmed by the Supreme Court of Puerto Rico through an opinion delivered by Mr. Chief Justice Del Toro (*Llubetas* v. *Mario Mercado e Hijos*, 55 P. R. R.

39), later on became a member of the Supreme Court of Puerto Rico and took part in the resolution and disposition of the instant case by the said Court.

Neither the judgment rendered by the District Court of Ponce in the unlawful detainer suit nor the judgment of the Supreme Court dismissing the appeal taken therefrom, constitutes *res judicata*. Both the District Court of Ponce and the Supreme Court of Puerto Rico in considering the questions involved in the unlawful detainer suit, did not go to the merits of the contentions in the present suit.[4]

Statutes.

The constitutional guarantee as to due process of law referred to by petitioner on page 15 of its brief, should always be borne in mind when justice is to be done. The provisions of the Civil Code, of the Law of Evidence and of the Mortgage Law referred to by the petitioner in its Appendix 1, at pages 33-36, are applicable to the case at bar.

In addition to the sections of the Civil Code therein mentioned, we now invoke Sections 1066, 1110, 1213, 1226, 1227, 1228, 1229, 1418, 1419 and 1420 of the referred to Code (1930 ed.). These Sections as well as Sections 185, 186 and 187 of the Regulations for the Execution of the Mortgage Law in force in Puerto Rico are copied in the Appendix No. 1.

Position of Opponents Herein.

The defendants, by their undersigned attorney, strongly oppose to the granting of the writ of certiorari prayed for and also to the alternative petition that a writ of *man-*

[4] "Whether said option is void or not; whether or not it was ceded to the heirs of Tous Soto and the effect that deed number 72 of ratification executed on March 31st, 1937, may have, are matters which we do not decide in this case because we think as we have said before that they must be decided in case number 311 *supra*."

damus be issued to the Circuit Court of Appeals for the First Circuit to reinstate the appeal and to consider the case on its merits, among other grounds, for the following:

First: Because the contention of the petitioner is without merits as this Honorable Court will verify from an examination of the record on appeal of the particulars pointed out by the petitioner.

The opponents answer to those particulars in their "Statement" (supra, p. 3) and in their observations as to the correctness and soundness of the judgments rendered by the District Court of Ponce and by the Supreme Court of Puerto Rico. (See, supra, p. 12).

The conclusion reached by the judge of the District Court of Ponce, who personally saw, observed and heard the witnesses giving testimony at the trial, and the conclusion reached by the Supreme Court of Puerto Rico on the testimony of those witnesses (Rec. 78-218) and the documentary evidence presented at the trial, as well as the construction placed upon, and application made of, the different local statutes involved to the facts of the case, should not be interfered with or be substituted by an appellate court. This is a well settled rule. There is nothing unusual or exceptional in the instant case warranting a departure from that rule or any reason why it should not be adhered to, especially in view of the fact that the five judges of the Supreme Court of Puerto Rico—as already stated two of them having had previous participation in this same case by considering and weighing the facts therein and applying the statutes thereto—had sustained the conclusions of the trial judge of the District Court of Ponce on rendering the judgment of which the petitioner now complains of.[5]

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[5] "This statute was enacted in May, 1938. The law at that time as to the review of findings of fact in equity was, as stated by Mr. Justice Brandeis for the Court, 'in equity', matters of fact as well as of law are reviewable. *Virginian R. Co.* v. *United States*, 272 U. S. 658, 675, 71 L.

Second:—The Circuit Court of Appeals has inherent power to adopt rules of the nature and to the extent of Rule 39(b). The rule is reasonable and does not either extend or limit the jurisdiction of the referred to court. It expedites the prompt decision of cases before the court and contemplates a rapid administration of justice. In the instant case that rule remedied a grave situation created by petitioner and put a stop to a manifest abuse committed by it. For seven long years the petitioning partnership had unlawfully been, and still is in possession, without any right or title thereto, of the properties belonging to the defendants, and had, during all that time, been enjoying the fruits and rents of the said properties without paying any rentals to the defendants.

The Circuit Court of Appeals for the First Circuit correctly followed the recommendation as to local law made by this Honorable Court in the case of *Sancho Bonet, Treas.* v. *The Texas Co.*, 308 U. S. 463, 460-472).

Third:—The Circuit Court of Appeals exercised its own criteria and discretion in rendering judgment in the instant case (Rec. 518). All presumptions of law are in favor of that judgment. There is no doubt that, in rendering its judgment, the Circuit Court passed upon petitioner's "Statement of Points" and "Statement of Appeal" aforesaid.

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ed. 463, 472, 47 S. Ct. 222. Findings of fact by the trial judge of course were presumptively correct and were accepted by reviewing courts unless clearly wrong. *Butte & S. Copper Co.* v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30, 63 L. ed. 447, 459, 39 S. Ct. 231. This rule, however, did not deny power to the Circuit Court of Appeals to review facts, but rather went to the weight to be accorded to the findings of a lower court and had special pertinence where credibility of witnesses was involved. This Court had 'a well settled rule that 'when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous.'" *Baker* v. *Schofield*, 243 U. S. 114, 118, 61 L. ed. 626, 630, 37 S. Ct. 333. Cited with approval in *District of Columbia* v. *Pace*, 88 L. ed. 321.

Fourth: The fact that in other cases the Circuit Court of Appeals had refused to dismiss an appeal on the ground that no questions of purely local law were involved therein, and had decided them on their merits, shows that the said court properly exercised its judicial discretion in the instant case and that, when meritorious contentions are presented thereto, the court goes to their merits. Where the contentions are frivolous, the court's action in dismissing the appeal is proper.

Fifth: In dismissing petitioner's appeal, the Circuit Court of Appeals exercised its jurisdiction properly too. The petitioner had the opportunity to ask that the judgment rendered by the Circuit Court of Appeals be reconsidered and to file brief therefor, but failed to do so. The petitioner had not been denied the equal protection of the laws nor a due process of law. What the petitioner has not been allowed to do is to perpetuate her conduct of having wrongfully taken possession of the properties of the defendants. Neither Section 2 of the Organic Act of Puerto Rico, nor the Fifth Amendment of the Constitution of the United States, have the wide scope that petitioner pretends they have, nor can the petitioner be encouraged in its wrongful acts.

Sixth: We affirm that the petitioner had all the opportunities to present its case in due form before the Circuit Court of Appeals for the First Circuit, but failed to do so. Nowhere in the record appears that the petitioner had asked for a reconsideration of the judgment rendered by that court, pursuant to Rule 39(b), nor that it had filed brief or demanded an opportunity to argue the case before the Circuit Court of Appeals.

Seventh: The judgment of the Supreme Court of Puerto Rico, affirming the judgment of the District Court of Ponce, is supported by the evidence and by the local laws governing the questions involved in the case and should be upheld by this Honorable Court.

Reasons Why the Remedy Should Not Be Granted.

On a thorough analysis of the attendant circumstances, as they are shown above, the instant case is not a proper one to annul Rule 39(b) of the Circuit Court of Appeals for the First Circuit. Considering the attendant circumstances aforesaid, the rule constitutes a safeguard to litigants and is remedial as it tends to remedy a serious situation created by the petitioner, a partnership operating against the agrarian policy of Puerto Rico that, not being satisfied with the agricultural lands it already owns and controls to the prejudice of the community in general, wishes to keep on acquiring and controlling more agricultural lands in open violation of the laws prohibiting such ownership and control in excess of the statutory 500 acres.

Petitioner Mario Mercado e Hijos had no right whatever over the "Option to Purchase and Sell and to Lease" clause when it brought the present suit in the District Court of Ponce. Notwithstanding the fact that it had no right nor was entitled to maintain this suit, the petitioner has enjoyed all the constitutional and statutory guarantees given to litigants in the defense of their eventual rights. No error of procedure has been committed by the Circuit Court of Appeals or by the Insular Courts, and therefore, neither the writ of certiorari prayed for should be granted, nor the appeal be ordered reinstated in the Circuit Court of Appeals for the First Circuit. Such action would only prolong indefinitely the conduct of the petitioner, that for the last seven years has been in the wrongful possession of the properties of the defendants, to the prejudice of their rights. The judgment of the Circuit Court of Appeals is correct.

For The Foregoing Reasons, we pray this Honorable

Court that the petition for a writ of certiorari be dismissed.

In Ponce, Puerto Rico., for Washington, D. C., this the —— of April, 1944.

C. DOMINGUEZ RUBIO,
Counsel for respondents,
Guayama, P. R.

LUIS LOPEZ DE VICTORIA, *Yauco, P. R.*
JOSE SABATER, *Mayaguez, P. R.*
LEOPOLDO TORMES GARCIA, *Ponce, P. R.*
Of Counsel.

By: LEOPOLDO TORMES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 497

MARIO MERCADO E HIJOS,

Petitioner,

vs.

ELVIRA OLIVIERI COMMINS, MANUEL FRANCISCO LLUBERAS, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN SUPPORT OF SUGGESTIONS IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Opinion Below.

The Supreme Court of Puerto Rico found the facts in the case were so clearly stated and the issues involved had been so well disposed of by the District Court of Ponce (Rec. 31-44), that it adopted the lower court's opinion and, resting on the reasons given by the trial court for its decision, unanimously affirmed the judgment of said court. (Rec. 474-477). 60 D.P.R. 877-890.

The Circuit Court of Appeals for the First Circuit was justified in dismissing an appeal, taken from the Supreme Court's judgment that was frivolous and groundless, as was also the suit herein brought by the petitioner. In taking such action, the Circuit Court properly applied Rule 39(b). (Rec. 518.)

Neither the District Court of Ponce, nor the Supreme Court of Puerto Rico had considered, nor could they have considered, the questions involved in the instant case when they entertained and decided the unlawful detainer suit referred to by the petitioner on page 21 of its brief. On delivering their opinions in the unlawful detainer suit—in said suit the sole question involved was the right to possession on the part of partnership Mario Mercado e Hijos over the properties "Indios" and "Juanita" under a previous contract of lease (Rec. 225-224)—both the District Court of Ponce and the Supreme Court of Puerto Rico were very careful on the questions decided therein. The District Court of Ponce (Judge Todd, Jr.) in making reference to the *Option*, expressed itself as follows:

> "Whether said option is void or not; whether or not it was ceded to the heirs of Tous Soto and the effect that deed number 72 of ratification executed on March 31st, 1937, may have, are matters which we do not decide in this case because we think, as we have said before, that they must be decided in case number 311, *supra*." *Lluberas* v. *Mario Mercado e Hijos*, 55 P.R.R. 39, 43.

On affirming the judgment rendered by the District Court of Ponce (55 P.R.R. 42-43), the Supreme Court of Puerto Rico copied in part the opinion of the trial court as a ground for its affirmance, and took the same views and position that the District Court of Ponce had taken as to the determination and disposition of the case.

This shows how groundless are the arguments of the petitioner when imputing errors to the District Court of Ponce and to the Supreme Court of Puerto Rico in the instant suit for rescission.

Jurisdiction.

Defendants have no doubts that this Court may review, by certiorari, the judgment of the Circuit Court of Appeals. It is regrettable, however, that such jurisdiction be exercised in connection with a petition resting on fallacies and subtleties that practically amount to professional malpractice.

Question Presented.

None of the questions presented by the petitioner rest on solid legal grounds. The facts upon which partnership Mario Mercado e Hijos bases the petition for certiorari are illusory and untenable under our statements made under subdivision "QUESTION PRESENTED" (supra, 2).

Statutes.

As already stated, there is no constitutional nor federal question involved in the instant case. The petitioner has in no way been deprived of any right guaranteed by the Constitution or by the federal statutes in force in Puerto Rico. It cannot seriously contend that it had not been afforded protection under the insular statutes. The Federal Constitution and the insular laws have been enacted to protect citizens in their rights when such rights have been violated, not to consecrate or to perpetuate abuses of power, nor to encourage violations of the laws. The sections of the laws applicable to and necessary for a determination of the questions presented, are cited in Appendix I (infra, 42).

Specification of Errors By Petitioner.

No such errors exist. They are imaginary, and based on speculations.

Summary Arguments of Respondents.

They have been answered by the defendants on explaining their position in the case. (Supra, 15).

Statement of the Case of Respondent's Position.

Petitioner's "STATEMENT OF THE CASE" is not supported in any way by the record.

A chronological statement of facts in opposition to those stated by the petitioner, appears in Appendix II. (Infra, 62).

Opinion of the District Court of Ponce and of the Supreme Court of Puerto Rico.

The District Court of Ponce (i.e. the trial court) dismissed, as groundless, the contentions of petitioner. (Rec. 31-45). The Supreme Court of Puerto Rico rejected petitioner's contentions, based on local statutes in force in Puerto Rico applicable to the facts of the case as they appeared from the record on appeal, and, by a unanimous opinion, affirmed the judgment rendered by the said District Court of Ponce (trial court). (Rec. 474-488).

The Circuit Court of Appeals for the First Circuit affirmed the judgment of our Supreme Court. (Unanimous opinion). (Rec. 518.)

Argument.

POINT I.

The petitioner contends that the judgment rendered by the Supreme Court of Puerto Rico "was clearly wrong; even patently erroneous; or ineseapably wrong."

A-B. We shall not follow petitioner's way of arguing which consists of making assertions that are untenable. In the brief in support of its contentions, petitioner refers to isolated portions of the opinions delivered by the District Court of Ponce and the Supreme Court of Puerto Rico. Defendants ***KNEW*** that partnership Mario Mercado e Hijos HAD a right to the OPTION to purchase and to lease the "Indios" and "Juanita" properties, *but they also knew*, and they testified thereto, (Rec. 93-103; 111-112) that the said partnership had alienated and parted with the said right by having conveyed and assigned it to the Heirs of José Tous Soto by public deed dated May 9, 1933 (Exhibit "2" for the defendants, Rec. 397-411). The relevant part of said deed recites as follows:

> "Mr. Mario Mercado y Montalvo, as the sole managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, hereby *conveys, renounces and assigns* in favor of Mrs. Belén González, widow of Tous, in the representation in which she appears in this execution and *in her own right*, and to doña Ana Rosa Tous de Carrión, Doñ Luz Belén Tous de Usera, Doña Alicia and Doña Celia Tous y González, the mortgage credit constituted by the deed above transcribed, *the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act* and in my presence and that of the witnesses the four mortgage promissory notes above mentioned duly endorsed, to all of which, I, the Notary, certify. (Rec. 406.)

Notary Fernando Zapater, attorney for petitioner Mario Mercado e Hijos, complying with the terms of Section 152 of the Mortgage Law, served notice on the mortgagor, Elvira Olivieri Commins, of the assignment of the mortgage credit, as follows:

"(Exhibit "3" of the defendants).

"Attorney Fernando Zapater Martinez, Attorney and Notary Public. Ponce, Puerto Rico.

"Notice of Assignment.

"Mrs. Elvira Olivieri Commins, Maygüez, Puerto Rico:

"You are hereby notified that on even date Mr. Mario Mercado Montalvo, as manager of the partnership Mario Mercado e Hijos and by deed executed before me and marked No. 33, has assigned in favor of the Heirs of José Tous Soto, the mortgage credit constituted by you in favor of the latter by indorsement of four mortgage promissory notes subscribed by you on March 23, 1932, notes marked 1, 2 and 3 for the sums of $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, respectively, and not marked 4, for $11,256.89, as principal, $3,000.00 for interest and $500.00 for costs, which promissory notes were held by the aforesaid partnership, which mortgage was constituted by you by deed No. 13, executed before Notary José Tous Soto on March 23, 1932, upon the on-half joint interests held by you in the estates known as "Juanita", lying in the 'Pueblo' and "Quebrada' barrios of the municipal district of Guayanilla, with an area of 481 cuerdas, and estate known as 'Los Indios", lying in the 'Indios' barrio, of Guayanilla, with an area of 430 cuerdas, an unverified copy of said deed of assignment being enclosed herewith. Ponce, Puerto Rico, May 9, 1933. (Sgd.) F. Zapater, Notary-Public.

"I, HEREBY CERTIFY: That on even date and prior to the collection of the mail for the city of Mayagüez, Puerto Rico, I deposited in the post office of Ponce an envelope duly sealed and with the proper postage enclosing a true and faithful copy of the deed of assignment referred to in the foregoing notice, as well as of this Notice of Assignment addressed as follows: 'Mrs. Elvira Olivieri Commins, Mayagüez, Puerto Rico.' That between Ponce and Mayagüez there is a regular daily mail service. Ponce, Puerto Rico, May 10, 1933. (Sgd.) F. Zapater, Notary-Public. There is stamped hereon the notarial seal)" (Rec. 412-413).

Said assignment of the mortgage credit was recorded in the Registry of Property of Ponce, in favor of the Heirs or Succession of José Tous Soto, but nowhere in the record entry made in the Registry of Property could the alleged reservation by Mario Mercado e Hijos to the "Option to Purchase and Sell and to Lease" clause appear (Rec. 460-471.)[1]

Such reservation of the option clause did not exist, and hence could not appear in, nor did it appear from either the deed assigning the mortgage or from the record entry of the said assignment in the Registry.

The clear and unequivocal language in the deed of "Assignment of Mortgage Credit", and the notice of the assignment served by petitioner's attorney and agent, allows no room for inference whatever (Sections 468-471 of the Code of Civil Procedure, 1933 ed.) as to the alleged intention on the part of partnership Mario Mercado e Hijos of having reserved for itself any right over the "Option to Purchase and Sell and to Lease" clause in the mortgage deed. The provisions of Section 1233 of the Civil Code[2] are not applicable to such a clear and unequivocal language nor do they play any part in connection with those documents. The provisions of law applicable to such a situation and to

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[1] The alleged reservation on the part of the petitioner, Mario Mercado e Hijos, as to the option clause does not appear from the text of the record entries in the Registry of Property of Ponce It is so stated by the Registrar of Property of Ponce in a certificate that says:

"(3) That it does not appear from the records just transcribed, to which the aforesaid deeds gave rise, that the partnership Mario Mercado e Hijos, or anybody else, has reserved to itself the option to purchase and lease referred to in the record of the mortgage which has been assigned and cancelled." (Rec. 471.)

[2] "Section 1233.—If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed.

"If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail."

the acts of the petitioner are Section 388, and subdivisions 2 and 3 of Section 463 of the Code of Civil Procedure (1933 ed.).[3]

C. On assigning by deed to the Heirs of José Tous Soto, the promissory notes owned by Elvira Olivieri Commins, together with the mortgage securing them (Rec. 397-411), without a reservation on the part of partnership Mario Mercado e Hijos over the option clause, the referred to partnership and the Heirs of José Tous Soto included in the deed of assignment ALL THE CONDITIONS they deemed most advantageous to each. The Insular Court correctly applied the provisions of Section 1418 of the Civil Code, in relation with Sections 1419 and 1420 of that same Code (1930 ed.) to that negotiation.[4] (See Appendix I, *infra*).

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[3] "Section 388.—In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

"Section 463.—The following presumptions, and no others, are deemed conclusive:

"2. The truth of the facts recited, from the recital in a written instrument between the parties thereto or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

"3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he can not in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

[4] "Section 1418.—The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge, or privilege.

"Section 1419.—A vendor in good faith shall be liable for the existence and legitimacy of the credit at the time of the sale unless it should have been sold as doubtful, but he shall not be liable for the solvency of the debtor unless it has been expressly stipulated, or if the insolvency should be prior and public.

"Even in these cases he shall only be liable for the price received and for the expenses mentioned in number 1 of section 1407.

"The vendor in bad faith shall always be liable for the payment of all the expenses, and for the losses and damages.

"Section 1420—If the assignor in good faith should have made himself liable for the solvency of the debtor, and the contracting parties should not have stipulated anything with regard to the duration of the liability,

According to those sections of the Civil Code, Mario Mercado e Hijos was the assignor in GOOD FAITH of a mortgage credit, and as such was legally liable for the existence and legitimacy of the credit. That obligation created by law, and those obligations that arose out, thereby assumed by partnership Mario Mercado e Hijos in the contract of ASSIGNMENT OF THE MORTGAGE CREDIT did not entitle the petitioning partnership to be a part owner of the mortgage credit which, of its own volition and with a view to obtain a profit in the negotiation thereof, it had *totally* conveyed and assigned to the Heirs of José Tous Soto in consideration of the sum of $41,256.89, paid by them to partnership Mario Mercado e Hijos. That sum was later on paid over in full by the mortgagor to the Heirs of José Tous Soto, and the mortgage securing the promissory notes was totally cancelled (Rec. 312-321). Neither the partnership Mario Mercado e Hijos, nor any of its partners or agents, had any intervention whatever in the negotiations for the cancellation of the mortgage. The cancellation produced its legal effects in the Registry of Property (Rec. 460-471).

In addition to what we have stated, and to avoid repetitions, we shall later on explain why Mario Mercado e Hijos retained the three-fourths of one *per cent* interest on the principal owed by Elvira Olivieri Commins to the Heirs of José Tous Soto since August, 1933. Be it stated that Mario Mercado e Hijos did not receive the proceeds from the said interest from the moment that Elvira Olivieri Commins, the mortgagor, paid the principal so owed to the Heirs of Tous Soto, her sole creditors then.

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it shall last one year only, to be counted from the assignment of the credit if the period had already matured.

"If the credit should be payable within a term or period which has not yet expired, the liability shall cease one year after its maturity.

"Should the credit consist of a perpetual income, the liability shall be extinguished after ten years, counted from the date of the assignment."

D. We stated in this brief (ante, p. 25) the participation that partnership Mario Mercado e Hijos had in the deed, for the Partition of the "Indios" and "Juanita" properties, executed by the sisters Sanita and Elvira Olivieri Commins. Nowhere in the Partition Deed (Rec. 397-425) does it Appear that Elvira Olivieri Commins had acknowledged or conceded any rights to Partnership Mario Mercado e Hijos over the Option To Purchase And To Lease Clause embodied in the mortgage deed. The only relations at that time existing between the said partnership and Elvira Olivieri Commins were only those of lessor and lessee (Rec. 227). The relations between Sanita Olivieri Commins, a sister of Elvira, and the referred to partnership could in no way bind Elvira Olivieri Commins. In August 1936, when the said partition was made, the Heirs of Tous Soto were the sole owners of the promissory notes and of the mortgage securing them. Since May 9, 1933 (Rec. 397-412), by the deed assigning the mortgage credit, partnership Mario Mercado e Hijos had given notice of that fact to all the world. The only right that Mario Mercado e Hijos had on that date was to retain the proceeds of the three-fourths of one *per cent* of the monthly interest accruing from the principal then owed by Elvira Olivieri Commins to the Heirs of José Tous Soto. The money covering the said percentage on monthly interest referred to was neither delivered, nor paid by Elvira Olivieri Commins, to the partnership Mario Mercado e Hijos. Said partnership retained it from the $4,100 which it was bound to pay annually to Elvira Olivieri Commins as rental of the lease that it had over the "Indios" and "Juanita" properties owned by Elvira Olivieri Commins (Rec. 234, 326).

Had it been true that Mario Mercado e Hijos had reserved any right over the option clause embodied in the mortgage contract, or that the reservation of said right was a condition in the contract of Assignment Of The Mortgage Credit

owed by Elvira Olivieri Commins, why was not said reservation expressly stated, there being nothing to prevent it, as one of the conditions in the deed assigning the mortgage, and in which deed neither Elvira Olivieri Commins nor any of the other defendants intervened?

E. The District Court of Ponce said in its opinion:

> "When Mario Mercado e Hijos conveyed to the heirs of Tous Soto the said mortgage credit it made a special stipulation in regard to the interests on the credit, but it failed to make any reservation in regard to the clause of option to sell and lease. Nor was said clause mentioned by the heirs of Tous Soto when it applied to this court for leave to become the assignee of the credit, nor either when leave was sought for the cancellation of said credit by said heirs:
>
> "Neither deed No. 72 of May 31, 1937, executed before notary Zapater, regarding ratification of mortgage credit by the heirs of Tous Soto (Exhibit F of the plaintiff) nor the proceedings No. 299, before this court, regarding the approval of said deed, has any weight in the present cases, because said deed No. 72 was executed after the total cancellation of the mortgage credit by the heirs of Tous Soto.
>
> "For the foregoing, we come to the conclusion that 'when Mario Mercado e Hijos conveyed to the heirs of Tous Soto the mortgage credit, it also conveyed the rights embodied in clause 7 of option to sell and lease' " (Rec. 41-42).

To the agreements entered into, later on, by the Heirs of José Tous Soto and partnership Mario Mercado e Hijos in connection with the option clause, the trial court gave no probative force. The District Court of Ponce correctly weighed the documentary and oral evidence submitted to it. In the unanimous opinion delivered by Mr. Chief Justice Del Toro affirming the judgment of the District Court of Ponce, the Supreme Court of Puerto Rico said as follows:

"If the plaintiff when assigning its promissory notes to the Heirs of Tous Soto had expressly reserved to itself the right of option and if when recording the assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them. The record of the original contract in the registry and that of the second contract without any reservation in regard to option, entitled the defendants to proceed as regards the plaintiff in accordance with their construction of the statute. And we have already seen that according to the statute the assignment without reservation of the mortgage notes carried with that of the option. Therefore, if the defendants resolved to assume any risk towards the plaintiff when acting in the way they did, such risk entirely disappeared when the legal precept applicable thereto was established.

"The appeals must be dismissed and the judgments appealed from affirmed.

"(Sgd.) Emilio Del Toro, Chief Justice."

(Rec. 487.)

The foregoing excerpt from the opinion of the Supreme Court of Puerto Rico sufficiently answers the groundless arguments adduced by petitioner in its attempts to construe provisions of law in force in Puerto Rico and to apply them to the facts of the case appearing from the record.

Point II.

A.—The insular courts correctly construed and applied Section 1759 of the Civil Code (1930 ed.) to the facts of the instant case.[5]

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[5] "Section 1759.—The pledge and the mortgage are indivisible, even if the debt should be divided among the legal representatives of the debtor or of the creditor.

"Therefore, an heir of the debtor who may have paid a part of the debt can not request that the pledge or mortgage be proportionately extinguished as long as the debt has not been paid in full.

It is elementary in law, that a mortgage is *indivisible*. The absolute terms by which Mario Mercado e Hijos conveyed and assigned the four promissory notes and the mortgage securing them to the Heirs of José Tous Soto, subrogating the said heirs *in the place, degree or priority* in which Mario Mercado e Hijos (Rec. 406) stood as to the said promissory notes and mortgage, speaks for itself, and requires no further comment. *United Firemen's Ins. Co.* v. *Registrar*, 44 P. R. R. 816.

The mortgage credit, that is, the principal secured by the mortgage may be divided among various creditors or different installments may be stipulated for paying such principal; but the accessory, secondary and subsidiary contract of mortgage is one and indivisible and follows the whole or any part of the principal obligation wherever it goes to.

The mortgage was constituted in clause 2 of the mortgage deed (Exhibit "J" for plaintiff, Rec. 325) to secure all and each of the promissory notes issued and to secure not only the principal owed, but also an additional sum for interest on the said principal and for costs, expenses, disbursements and attorneys' fees in case of judicial recovery.

The mortgage was not constituted to secure the option to purchase and sell and to lease. Neither was it constituted to secure the waiver of homestead, nor to secure other waivers made and securities or warranties given by the mortgagor to the mortgagee in the said mortgage deed.

"Neither can the heir of the creditor, who received his part of the debt, return the pledge nor cancel the mortgage to the prejudice of the other heirs who have not been paid.

From these provisions is excepted the case in which there are several things given in mortgage or pledge and each of them secures only a specified part of the credit.

The debtor in such case shall be entitled to have the pledge or mortgage extinguished in proportion as he pays the part of the debt for which each thing is specially liable."

The option, the waiver of homestead and the other waivers made and securities given were embodied in the mortgage. They cannot be separated, or segregated, from the said mortgage; they are an indivisible part thereof, and, therefore, plaintiff could not assign the said mortgage credit in full and still reserve for itself the benefit of the waiver of homestead or reserve for itself the option independently of the mortgage.

B.—The negotiation whereby partnership Mario Mercado e Hijos conveyed and assigned to the Heirs of José Tous Soto the four promissory notes secured with mortgage owed by Elvira Olivieri Commins and the mortgage securing the payment of the full amount of the referred to promissory notes, without making any reservation to the Option to Purchase and Sell and to Lease clause that was embodied in and formed an integral part of the mortgage (Rec. 397-411) speaks for itself. The terms under which the assignment was made are clear and were fully complied with and observed by all the parties. The petitioning partnership had only reserved, by agreement with the Heirs of Tous Soto, the right to retain three-fourths of one *per cent* of the interest accruing monthly on the principal owed by Elvira Olivieri Commins (Rec. 406). The three-fourths of one *per cent* on the interest was retained by Mario Mercado e Hijos while Elvira Olivieri Commins owed the principal secured with mortgage to the Heirs of José Tous Soto. Elvira Olivieri Commins paid the said principal to the Heirs of José Tous Soto and, with the authorization of the District Court of Ponce (Rec. 425-451), the said heirs *totally* cancelled the mortgage securing the promissory notes. Partnership Mario Mercado e Hijos had no intervention therein (Rec. 312-313). From the date in which the mortgage credit was cancelled, partnership Mario Mercado e Hijos had no right to retain any part of the rents that it was bound to pay to Elvira Olivieri

Commins, semi-annually, as lease rental of the "Indios" and "Juanita" properties (Rec. 326). The reservation that Mario Mercado e Hijos had made over the interests accruing on the principal of the mortgage owed, did not give the said partnership any rights over the mortgage. The partnership was only a debtor of Elvira Olivieri Commins, under the contract of lease of the "Indios" and "Juanita" properties belonging to her. That status of being such debtor under the lease contract existed independently of the mortgage, notwithstanding the provisions of Section 1112 of the Civil Code (1930 ed.) to the effect that any person may make a payment for the account of another.[6]

C.—Our arguments and citations made in subdivisions "A" and "B" of Point I (ante, 25), fully answer the arguments of the petitioner in subdivisions "A" and "B" of Point I of petitioner's brief.

D.—The petitioning partnership is not entitled to satisfy its ambitions through, and to make a case out, of a situation voluntarily created by its as above explained, to the detriment of the defendants and especially of the Lluberas-Passarell Brothers. If partnership Mario Mercado e Hijos had any interest in purchasing from Elvira Olivieri Commins the properties belonging to her, it should have had offered and paid for such properties their just and true value. Partnership Mario Mercado e Hijos wanted to take advantage of its position as creditor of Elvira Olivieri Commins, by forcing her to accept onerous conditions in the mortgage contract. Even though Elvira Olivieri Com-

[6] "Section 1112.—Any person, whether he has an interest or not in the fulfilment of the obligation, and whether the debtor knows and approves it or is not aware thereof, can make the payment.

"The person paying for the account of another may recover from the debtor what he may have paid, unless he has done it against his express will.

"In such case he can only recover from the debtor in so far as the payment has been useful to him."

mins knew that Mario Mercado e Hijos had no right over the Option to Purchase and Sell and to Lease clause since May 9, 1933 (Rec. 397 *et seq.*) she held many conversations with members and agents of Mario Mercado e Hijos, through a relative and agent of hers, Rafael Barletta, in an endeavor to sell and to lease her properties. Elvira Olivieri Commins was at liberty to look for purchasers. There was nothing barring her from doing so. She was at liberty to seek loans of money from other persons and to pay her debts to her creditors, i.e., to the Heirs of José Tous Soto, as she did, long before the promissory notes became due. Nothing existed in the way of prohibiting Elvira Olivieri Commins from taking proper steps toward such end. What Elvira Olivieri Commins never did was to surrender to the will of partnership Mario Mercado e Hijos. Said partnership had only offered her $28,400 for the property later on sold by her to the Lluberas-Passarell Brothers.

Point III.

A-B-C. Our arguments adduced in connection with the particulars discussed by petitioner in Point I, sufficiently answer those of the petitioner under subdivisions "A", "B" and "C" of Point III. Petitioner's arguments are a mere repetition of former arguments.

When on March 6, 1937, Elvira Olivieri Commins paid the full amount of the four promissory notes, she had secured with mortgage over her "Indios" and "Juanita" properties, she paid to her then legitimate creditors, the Heirs of José Tous Soto (Rec. 312, 425-454). The payment so made by Elvira Olivieri Commins had the legal effect of extinguishing the mortgage obligation. (Section 1010 of the Civil Code, 1930 ed.) [7]

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[7] "Second: By virtue of the terms of the foregoing clause, Mrs. Belén González, in her own right and in the representation assumed by her herein, conformable to the order of the District Court for the Judicial District of Ponce already transcribed, Doña Luz-Belén, Doña Ana-Rose, Doña Alicia,

The Heirs of José Tous Soto are not claiming anything from the defendants herein. Partnership Mario Mercado e Hijos is not entitled to claim any right that might have belonged to the Heirs of José Tous Soto. As to any such right, had it existed, the Heirs of Tous Soto were the only ones entitled to waive it, as they did in the instant case, by waiving three-month interest on the principal on receiving payment of the mortgage obligation long before the latter fell due (Rec. 312-327, 425-454).

Point IV.

A. B. C.—The Supreme Court of Puerto Rico complied with, and correctly applied, the local laws to the facts of the instant case as they appeared from the record. Our Island is governed by laws and not by the caprice or will of any individual or group of individuals acting against the law and applying later to the courts of justice for redress, in an attempt to have those laws construed in their favor, at their will and to their convenience.

Since 1937, the petitioning partnership had taken wrongful possession of the properties of the defendants. The untimely deposit made in court by that partnership before the District Court of Ponce, in an endeavor to pay thereby to the Lluberas-Passarell Brothers, defendants herein, the amount that they had paid over to Elvira Olivieri Commins as purchase price for the "Indios" property, does not en-

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Doña Celia, Doña Belén-María, Doña Gladys and Don Jorge Tous González, the first three parties with the express consent of their respective spouses Don Vicente Usera, Jr., Don José B. Carrión and Don Ignacio Maldonado, acknowledge as fully cancelled and extinguished the mortgage constituted by deed No. 13, dated March 23, 1932, executed before notary José Tous Soto, the attesting notary in said execution acting as a substitute, in favor of the partnership Mario Mercado e Hijos, and conveyed subsequently to the parties hereto by said deed No. 33, dated May 9, 1933, before me, such cancellation to be recorded in the proper registry of property conformable to the wish and consent of the parties." (Rec. pp. 318-319.)

title the said partnership to the enjoyment of that property. The said partnership had no right in regard to the option clause to purchase and sell and to lease embodied in the mortgage contract—as an integral part thereof—after it had voluntarily parted with the mortgage and the promissory notes that the said mortgage secured, by conveying and assigning them to the Heirs of José Tous Soto without making any express reservation in regard to said option.

It is worthwhile stating here that, as regards the mortgage credit to the Heirs of Tous Soto, judicial authorization was requested from the District Court of Ponce, as there were minors and an incapacitated person interested in the negotiation. It must be suggested that any reservation of rights then made, if any, was disclosed to the court so that, with full knowledge of the reservation, the court should finally decide whether or not the transaction was convenient and beneficial to the minors and whether or not the negotiation should be made. The right of option to purchase and sell and to lease, the subject of the alleged reservation, had as a consideration for it, the mortgage contract. That right was given as part of the consideration of the mortgage contract (Rec. 327). The fact that no disclosure was made to the court as to the alleged reservation herein, shows that no such reservation had been made at the time and that it did not exist. Had the reservation been made, i.e., had it existed, it would undoubtedly had been disclosed to the court, especially in view that it was so fundamentally important to Mario Mercado e Hijos. The present litigation attest to that importance. Parties entering into contracts look forward diligently to the protection of their rights or of those rights which they may possibly have thereunder. The usual and customary thing for them to do is to protect their rights, not to abandon them. If the alleged reservation was true, the parties to the negotiation should not have refrained from disclosing it to the court so that the court

and the minors would know that the assignment of the mortgage contract did not pass with it the option which was an integral part of the mortgage. Their silence amounted to fraud or deceit practiced upon the court as well as upon the minors who were then purchasing the mortgage credit. The mortgage credit to be assigned carried with it a recorded realty right—the option to purchase—in favor of the mortgagee, i.e., the minors as assignees of the said mortgage credit. The minors could not be deprived of such real right without the express authorization of the District Court of Ponce in the proceedings for authorization to assign the mortgage credit to such minors (Rec. 425-454). In other words, the mortgage creditor, Mario Mercado e Hijos, and the mother of the minors could not, without the district court's authorization, enter into any agreement whereby the original mortgage creditor (Mario Mercado e Hijos) was to keep for himself something that was a vital and integral part of the mortgage contract, to be assigned to the minors (*F. Zayas, S. en C.* v. *Torres*, 51 P. R. R. 772; *Cruz* v. *Central Pasto Viejo, Inc.*, 44 P. R. R. 354). The silence of the parties negotiating the assignment of the mortgage was a deceit upon the court as well as upon the minors. To hold that there was such a reservation, would amount to a protection of a fraud, to the benefit of a party to that fraud, i.e., of Mario Mercado e Hijos, a partnership that, according to its own pleadings had not come into court with clean hands as regards the assignment of the mortgage credit. It is not the mission of the courts to protect fraud or deceit. Litigants cannot reap any benefits arising out of their own fraud and deceit.

Point V.

A.—Rule 39(b) of the Circuit Court of Appeals for the First Circuit is VALID and has been properly and wisely applied to the facts in the case as they appear from the

record. The said Circuit Court made a proper use of its judicial discretion under the law, in her appreciation of the facts as they appear from the said record and as they were presented by petitioner in its "STATEMENT OF POINTS", and "STATEMENT OF APPEAL" (Rec. 495-498), in view of the defendents' motion (Rec. 514-518) to dismiss the appeal on the ground that said appeal was not justified and that it had been taken to hinder and delay the due administration of justice, and on the further ground that the judgment of the District Court of Ponce (Rec. 45), unanimously affirmed by the Supreme Court of Puerto Rico (Rec. 488), is not contrary to the law or to the facts as they appear from the evidence in the record as weighed by the trial court. The Circuit Court of Appeals for the First Circuit complied with and observed the due process clause of the Constitution. The petitioner had its day in court and had not been denied the equal protection of the laws. Petitioner's contentions have no support in the law and, therefore, the judgment was adverse to petitioner.

Before coming into this Honorable Supreme Court to sue out the writ of certiorari the petitioner should have moved the Circuit Court of Appeals for a reconsideration of its judgment affirming that of the Supreme Court of Puerto Rico, presenting grounds therefor and briefs in their support, and, moreover, should have requested from the Circuit Court that a hearing be had on the motion for reconsideration. Petitioner failed to do so, and cannot now complain that the Circuit Court of Appeals had not complied with and observed the due process clause of the Constitution.

Conclusion.

The judgment of the Supreme Court of Puerto Rico, affirming that of the District Court of Ponce, is correct. It accords with and conforms to the local laws as they have been

applied in this jurisdiction for over half a century. There is no legal ground for a reversal. In Puerto Rico, appeals are taken from the judgments of the courts and not from the reasons specified by the said courts for their decisions. Their reasoning may be erroneous. Nevertheless, the judgment may be correct if supported by the evidence adduced at the trial. Petitioner herein was heard by the Circuit Court of Appeals. The said Circuit Court did not deprive petitioner of any constitutional right. The judgment of the Circuit Court puts an end to petitioner's wrongful possession of properties that do not belong to it, a possession enjoyed for seven long years to the prejudice of the defendants, who are the rightful owners of said properties.

Justice has been done in the instant case.

The writ of certiorari should be denied and it is so prayed.

Respectfully submitted,

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By LEOPOLDO TORMES.

Received copy: Ponce, P. R., April 5, 1944.

PEDRO M. PORRATE,
One of the Attorneys for Petitioner.
Per (name illegible)

APPENDIX I.

Statutes.

PUERTO RICO

CIVIL CODE (Edition 1930)

Section 1044.—Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations.

Section 1066.—Every obligation, the fulfilment of which should not depend upon a future or uncertain event or upon a past event, unknown to the parties in interest, shall be immediately demandable.

Every obligation, containing a condition subsequent, shall also be demandable without prejudice to the effect of the performance.

Section 1110.—Obligations are extinguished:

By their payment or fulfilment.
By the loss of the thing due.
By the remission of the debt.
By the merging of the rights of the creditor and debtor.
By compensation.
By novation.

Section 1207.—The contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals, or public order.

Section 1213.—There is no contract unless the following requisites exist:

1.—The consent of the contracting parties.
2.—A definite object which may be the subject of the contract.
3.—The cause for the obligation which may be established.

Section 1226.—In contracts, involving a valuable consideration, the prestation or promise of a thing or services by the other party is understood as a consideration for each contracting party; in remuneratory contracts, the service or

benefits remunerated, and in those of pure beneficence, the mere liberality of the benefactor.

Section 1227.—Contracts without consideration or with an illicit one have no effect whatsoever. A consideration is illicit when it is contrary to law and good morals.

Section 1228.—The statement of a false consideration in contracts shall render them void, unless it be proven that they were based on another real and licit one.

Section 1229.—Even though the consideration should not be expressed in the contract, it is presumed that it exists and that it is licit, unless the debtor proves the contrary.

Section 1418.—The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge, or privilege.

Section 1419.—A vendor in good faith shall be liable for the existence and legitimacy of the credit at the time of the sale unless it should have been sold as doubtful, but he shall not be liable for the solvency of the debtor unless it has been expressly stipulated, or if the insolvency should be prior and public.

Even in these cases he shall only be liable for the price received and for the expenses mentioned in number 1 of section 1407.

The vendor in bad faith shall always be liable for the payment of all the expenses, and for the losses and damages.

Section 1420.—If the assignor in good faith should have made himself liable for the solvency of the debtor, and the contracting parties should not have stipulated anything with regard to the duration of the liability, it shall last one year only, to be counted from the assignment of the credit if the period had already matured.

If the credit should be payable within a term or period which has not yet expired, the liability shall cease one year after its maturity.

Should the credit consist of a perpetual income, the liability shall be extinguished after ten years, counted from the date of the assignment.

Mortgage Law

Article 1.—Registries of real property shall continue to be situated where they have been established by the law. Registries can not be abolished or created, nor can the territorial district pertaining to each at the present time be changed, except by provision of law.

Instruments relating to estates situated within its territorial district shall be recorded in each registry. If an estate be situated within the territorial districts of two or more registries, it shall be recorded in all of them.

Article 2.—The following shall be recorded in the registries mentioned in the preceding article:

First.—Deeds conveying or declaring the ownership of real property or of property rights therein.

Second.—Instruments constituting, recognizing, modifying or extinguishing rights of usufruct, use, habitation, emphyteusis, mortgages rent charges, servitudes or any other real rights.

Third.—Acts or contracts under which real property or real rights are conveyed to a person, even though it be with the obligation of conveying the same to another or of applying the value thereof to specific objects.

Fourth.—Final judgment declaring legal incapacity to administrate, or the presumption of death of absentees, imposing a penalty of interdiction or any other penalty affecting the civil capacity of persons as to the free disposition of their property.

Fifth.—Contracts for the lease of real property for a term exceeding six years, or contracts under which rental for three or more years has been paid in advance, or contracts which do not have either of these conditions, but contain a special agreement between the parties that they be recorded.

Sixth.—Deeds of acquisition of real property and real rights possessed or administered by the State, or by civil or ecclesiastical corporations subject to the provisions of laws or regulations.

Article 24.—Recorded instruments shall produce their effects even against creditors specially preferred under the common law.

Article 25.—Recorded instruments shall not produce any effects as to third persons except from the date of their admission to recorded.

Article 26.—In order to determine the preference between two or more records of the same date, relating to one and the same estate, the hour the respective instruments were filed in the registry shall be considered.

Article 27.—For the purposes of this law, a third person shall be considered one who has not been a party to the recorded instrument or contract.

Article 28.—The date of the entry made upon presentation of an instrument, which must appear in the record itself, shall be considered the date of such record for all intents and purposes thereof.

Article 29.—Ownership or any other property right expressly mentioned in records or cautionary notices, although not appearing in the registry as a separate and special record, shall be effective against third persons from the date of the entry made upon presentation of the instrument.

The provisions of the foregoing paragraph shall be understood without prejudice to the obligation of specially recording such interests or to the liability which may be incurred by a person who must request the record in certain cases.

Article 30.—The records of the instruments mentioned in articles 2 and 5 shall be void if they do not set forth the circumstances mentioned in subdivisions 1, 2, 3, 4, 5, 6 and 8 of article 9, and subdivision 1 of article 13.

Article 31.—The nullity of the records referred to in the foregoing article shall not prejudice any interest previously acquired by a third person who was not a party to the recorded instrument or contract.

Article 32.—The record shall be understood to lack some of the details mentioned in the subdivisions and articles

cited in article 30, not only when it fails to mention all the requisites set forth in each of such articles or subdivisions, but also when they are expressed so inaccurately that a third person could thereby be lead into error as to the object of the same and suffer loss in consequence thereof.

When the inaccuracy is not material, in accordance with the provisions of the foregoing paragraph, or when the omission does not inclue all the details set forth in some of said subdivisions or articles, the record shall not be declared null and void unless it should cause an error and loss.

Article 33.—Instruments or contracts which are null under the law are not validated by their admission to record.

Article 34.—Notwithstanding the provisions of the foregoing article, instruments or contracts executed or entered into by person who, according to the registry, has a right to do so, shall not be invalidated with regard to third persons after they have been recorded, even though the interest of such party should subsequently be annulled or terminated by virtue of a prior deed which was not recorded or for reasons which do not clearly appear from said registry.

Only by virtue of a recorded instrument may another later instrument, also recorded, be invalidated to the prejudice of a third person, with the exceptions mentioned in article 389.

The provisions of this article shall at no time apply to an instrument recorded in accordance with the provisions of article 390, unless prescription has validated and assured the interest to which said instrument refers.

Article 35.—Prescription which does not require a good title (justo título) shall not prejudice a third person if the possession on which it is to be based does not appear of record.

Nor shall prescription which requires a good title prejudice a third person if such title is not recorded.

In either case the time of the prescription shall begin to run from the date of the record.

With regard to the legal owner of the real property or interest which is in process of prescribing, the title shall be determined and the time computed in accordance with the provisions of the common law.

Article 36.—Rescissory and resolutory actions shall not lie against third persons who have recorded the deeds of their respective interests in accordance with the provisions of this law.

Article 37.—The following are excepted from the rule contained in the foregoing article:

1.—Rescissory and resolutory actions which owe their origin to causes which specifically appear in the registry.

2.—Action for the rescission of conveyances made for the purpose of defrauding creditors in the following cases:

When the second conveyance was made under a gratuitous title.

When the third person was a party to the fraud.

In either case third persons shall not be prejudiced by a rescissory action not brought within one year from the date of the fraudulent conveyance.

Article 38.—As a consequence of the provisions of article 36, no instrument or contract shall be annulled or rescinded to the prejudice of a third person who shall have recorded his interest, for any of the following causes:

1. By reason of the revocation of donations in the cases permitted by the law, unless the donee shall fail to comply with the conditions recorded in the registry.

2. On account of legal redemption (retracto) in a sale or the right to acquire for the amount bid in emphyteusis.

3. On account of nonpayment or all or parte of the price of the thing sold; if the record should not show that payment was postponed.

4. On account of a duplicate sale of the same thing when one of the sales has not been recorded.

5. On account of a lesion in cases 1 and 2 of article 1291 of the Civil Code.

6. On account of conveyances made for the purposes of defrauding creditors, with the exception of the cases mentioned in the preceding article.

7. On account of any other actions which special laws or statutes grant to specific persons for the rescission of contracts by reason of causes which the record does not expressly show.

In any case in which the resolutory or rescissory action can not be brought against a third person in accordance with the provisions of this article, the proper personal action may be brought for the recovery of damages from the person who may have caused them.

Article 39.—By a conveyance under a gratuitous title to defraud creditors, in the first case of subdivision 2 of article 37, shall be understood not only one made by donation or assignment of the interest, but also any alienation, creation, or renunciation of a property right by the debtor within the periods mentioned in the common laws and in the laws of commerce, for the revocation of conveyances made to defraud creditors, provided there was no price, or its equivalent, or any preexisting past-due obligation.

Article 40.—The following may be revoked, in accordance with the provisions of the foregoing article, if the circumstances therein mentioned are present:

1. Rent charges, emphyteusis, servitudes, usufructs and other property rights created by the debtor.

2. The establishment of dowries or donations by reason of marriage in favor of the wife, children, or strangers.

3. Assignments of real property for the payment of debts not yet due.

4. Voluntary mortgages constituted for the security of debts previously contracted without such security, and not due, provided the conditions of the principal obligation are not thereby made more burdensome.

5. Any contract by which the debtor expressly or tacitly conveys or renounces a property right.

It shall be understood that no price or its equivalents figures in such contracts, when the notary does not certify to its payment, or if the contracting parties acknowledge that such payment was made prior to the execution of the

contract, and this fact is not established, or it is shown that it comes within the provisions of the third subdivision of this article.

Article 41.—The possessor of the real property or real right shall be considered a party to the fraudulent conveyance thereof in the second case of subdivision 2 of article 37:

1. If it be proved that he was aware of the purpose of such conveyance and that he was a party thereto as last owner or in any other capacity.

2. If he acquired his interest either directly from the debtor or from a subsequent possessor for half or less than half its real value.

3. If any kind of false statement or subterfuge having been employed in the contract entered into by the debtor, it be proved that the possessor was aware or took advantage thereof.

Article 42.—The following may request the entry of cautionary notices of their respective rights in the proper public registry:

1. He who brings an action to recover the ownership of real property or the constitution, declaration, modification or extinction of any real right.

2. He who, in accordance with the law, has obtained in his favor a writ of attachment, which has been levied on real property of the debtor.

3. He who, in any action, has obtained a final judgment against the defendants which shall be enforced according to the procedure prescribed in the title 8 of the Law of Civil Procedure.

4. He who brings a declaratory action for the enforcement of any obligation and obtains, in accordance with the law, an order directing the attachment or forbidding the alienation of real property.

5. He who brings an action for the purpose of obtaining any of the orders mentioned in subdivision 4 of article 2 of this law.

6. The widowed spouse, by reason of the right vested in him or her by article 838 of the Civil Code.

7. A legatee who under the law does not have the right to institute testamentary proceedings.

8. An agricultural creditor during the continuation of the works for which the loan was made.

9. He who files in the office of the registrar an instrument which can not be definitely recorded on account of the omission of some requisite capable of being supplied or on account of the disability of the registrar.

10. He who shall have the right to demand the entry of a cautionary notice in any other case, according to the provisions of this law.

Article 43.—In the case of subdivision 1 of the preceding article, a cautionary notice can not be entered except under an order of the court made on motion of a le-timate party and by virtue of a document sufficient therefor in the discretion of the court.

In the case of subdivision 2 of said article, the cautionary notice shall be obligatory according to the provisions of article 1435 of the Law of Civil Procedure in force in the Philippines and article 1451 of that force in Cuba and Porto Rico.

In the case of subdivision 5 of the said preceding article, the cautionary notice must also be entered under a court's order which it may issue on its own motion when there are no interested parties who request it, if the court in its discretion deems it advisable to secure the effectiveness of any judgment which may be rendered in the action.

Article 44.—A creditor who obtains the entry of a cautionary notice in his favor under the circumstances enumerated in subdivision 2, 3 and 4 of article 42, shall have preference, only with regard to the property against which the notice appears, over those who have against the same debtor another claim contracted susequently to such entry.

Article 45.—In the case of subdivision 6 of article 42, a widowed spouse may request a cautionary notice of his or her

right of usufruct in all the real property of the estate, conforming to the procedure prescribed in articles 55, 56, and 57 of this law.

Article 46.—A devisee who has no right under the law to institute testamentary proceedings may at any time request a cautionary notice respecting the thing devised to him if it be specific real property..

If the devise is not specific, the devisee may demand a cautionary notice of its value upon any real property of the estate sufficient to cover it, within 180 days after the death of the testator.

In either case the notice shall be entered upon presentation to the registrar of the instrument on which the devisee bases his right.

A devisee of specific real property or of credits or pensions secured thereby can procure a cautionary notice as to such property only.

Article 149.—The records of voluntary mortgages may be canceled only in the manner prescribed in article 82. If the persons who should cause the cancellation to be made should not agree thereto, it may be ordered by the court.

Article 150.—When a rent charge subject to a mortgage is redeemed, the mortgagee shall have the right to demand of the redemptioner that he pay him his claim in full together with interest due and to become due, or that he recognize his mortgage on the estate which had been encumbered by the rent charge.

Article 151.—In the latter case of the preceding article a new record of the mortgage shall be made which shall clearly set forth its acknowledgment by the redemptioner and produce its effects from the date of such record.

Article 152.—A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry.

The debtor shall not be bound by said contract to any further extent than he was by his own.

The assignee shall be subrogated to all the rights of the assignor.

Article 153.—In a mortgage constituted to secure obligations transferable by indorsement or document payable to bearer, when the mortgage interest is conveyed or assigned, it shall be understood that the latter is conveyed, together with the obligation or document, without necessity of the debtor being advised thereof or the transfer being recorded in the registry.

Article 154.—If in case where it is necessary, a notice to the debtor of the assignment of the mortgage is omitted, the assignor shall be liable for any damage which the assignee may suffer as a consequence of such failure.

Regulations for execution of Mortgage Law

Article 185.—Before recording the assignment of a mortgage credit the debtor shall be advised, unless he shall have waived the right to notice in a public instrument, or if such a case as that mentioned in article 153 of the law should be involved, by means of a notice to be drawn signed by the notary who may have authenticated the deed, stating therein merely the date of the assignment, the facts of the same being total or partial, and in the latter case the amount, assigned, and the name, surname, residence, and occupation of the debtor.

If the debtor should not be found at his residence, service shall be made in the form prescribed for summonses in the first paragraph of article 268 of the Law of Civil Procedure for Cuba and Porto Rico, and 252 of that for the Philippines.

Article 186.—If the debtor should not reside in the town in which the deed is executed, the contract shall be recorded and the notice considered to have been served; but the assignor shall be obliged to petition the court to have a search made for the debtor and have the notice referred to served on him in the form prescribed in articles 266, 268, and 269 of the Law of Civil Procedure of Cuba and Porto Rico, 250, 252, and 253 of that for the Philippines, and under the liability established in article 154 of the Mortgage Law.

Article 187.—The assignment of a mortgage right shall be recorded in the registry in the form of a new record in favor of the assignee.

The transfer shall not be made a matter of record in the registry nor shall it be necessary to serve notice thereof on the debtor in the cases of exception mentioned in article 185.

Code of Civil Procedure of Puerto Rico

Section 388.—(26 L.) (1858 Cal.) In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Section 458.—(96 L.) (1957 Cal.) Indirect evidence is of two kinds:

1. Inferences; and
2. Presumptions.

Section 459.—(97 L.) (1958 Cal.) An inference is a deduction which the reason of the judge or jury makes from the facts proved, without an express direction of law to that effect.

Section 460.—(98 L.) (1959 Cal.) A presumption is a deduction which the law expressly directs to be made from particular facts.

Section 461.—(99 L.) (1960 Cal.) An inference must be founded:

1. On a fact legally proved; and

2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

Section 463.—(101 L.) (1962 Cal.) The following presumptions, and no others, are deemed conclusive:

1.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto or their suc-

cessor in interest by a subsequent title; but this rule does not apply to the ricital of a consideration.

3. Whenever a party has, by his own declaration, act, or ommission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he can not in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

Section 614.—(80 L.) (As amended by Act of March 9, 1911, page 119)—In all cases where, according to the provisions of the Civil Code, the parents or the tutor of a minor or incapacitated person, shall be in need of judicial authorization to do anything relative to the keeping of said minor or incapacitated person or of his property, a petition shall be filed with the district court of competent jurisdiction, setting forth under oath the following particulars:

1.—The name, age, domicile, civil status and profession of the petitioner, his legal relationship with the minor or incapacitated person, and if the petitioner be the tutor, then he shall add, the date of his appointment, the character of his tutorship and the affirmation that all the requirements necessary for the possession, security and faithful discharge of his duties as such tutor, have been complied with.

2.—The name, age, domicile, and civil status of the minor or incapacitated person and the names, and domiciles of his nearest akin relatives up to the fourth civil grade of consanguinity or second of affinity.

3.—Cause of the petition.

4.—The necessity or utility for the minor or incapacitated person of the act petitioned for.

5.—The minimum auction price of the property to be admitted in all cases of sale of real and personal property, where the value thereof exceeds the amounts determined in sections 229 and 282, paragraph five, of the Civil Code.

6.—If the authorization be for the constitution of a lien or encumbrance on real property, the nature and conditions of encumbrance shall be stated.

7.—The specific conditions of the contract in the case of exchange of real property or of the lease thereof, for a longer term than six years.

8.—The name of the party acquiring the right to be conveyed, except in the case of alienation through public sale.

9. —The placing or instrument to be made of the thing obtained by the minor or incapacitated person through the act or contract referred to in the authorization.

Section 615.—(81 L.) (As amended by Act of March 9, 1911, page 119)—Upon the filing of the petition, if this be in proper form, the court shall fix the date for the examination of the proof relative to the facts alleged, this act to take place in open court, or should the court be in recess, in the office of the judge, with the attendance of the district attorney whose duty shall be to protect the rights of the minor or incapacitated person.

The documentary proof shall comprise the demostration of the "patria potestas" or of the tutorship and if the authorization should apply to real estate, then the title of ownership and he assessment of the property for the purpose of taxation, if subject to taxes, shall also be included.

The judge, when deeming it advisable, shall have the right to, free of expense to the court, summon and examine, as to the facts alleged in the petition, the nearest adin relative of the minor or incapacitated person up to the fourth civil grade of consanguinity and second of affinity, residing in the Island, or any other person who may better serve to clear up the facts.

Should the minor be over fourteen years of age and he does not reside without the Island, he shall in every case appear before the court to answer the interrogatory to be put to him in the act of examining the proof.

The proofs having been examined, the judge shall grant or deny the authorization asked for in conformity with the result of the proof adduced, his decision being subject to appe-l to the Supreme Court of Porto Rico, either by the petitioner or the district attorney.

[No. 47]

AN ACT

To Amend Sections 2 and 6 of "An Act Establishing Quo Warranto Proceedings, Approved March 1, 1902, as Amended by Act No. 37, Approved April 24, 1931, and for Other Purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Section 2 of An Act entitled "An Act establishing Quo Warranto proceedings", approved March 1, 1902, is hereby amended as follows:

"Section 2.—In case any person should usurp, or unlawfully hold or execute any public office or should unlawfully make use of any franchise, or likewise shall hold any office in any corporation created by and existing under the laws of Puerto Rico, or any public officer shall have done or suffered any act which, by the provisions of the law, involves a forfeiture of his office, or any association or number of persons shall act within Puerto Rico as a corporation, without being legally incorporated, or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises rights not conferred by law, the Attorney General, or any prosecuting attorney of the respective district court, either on his own initiative or at the instance of another person, may file before any district court of Puerto Rico a petition for an information in the nature of *Quo Warranto* in the name of The People of Puerto Rico; or whenever any corporation, by itself or through any other subsidiary or affiliated entity or agent, exercises rights, performs acts, or makes contracts in violation of the express provisions of the Organic Act of Puerto Rico or of any of its statutes, the Attorney General or any district attorney, either on his own initiative or at the instance of another person, may file before the Supreme Court of Puerto Rico a petition for an information in the nature of *Quo Warranto* in the name of The People of Puerto Rico; and if from the allegations such court shall be satisfied that there is probable ground for the

proceeding, the court may grant the petition and order the information accordingly. Where it appears to the court that the several rights of divers parties to the same office or franchise may properly be determined on the same proceeding, the court may give leave to join all such persons in the same petition, in order to try their respective rights to such office or franchise."

"When any corporation by itself or through any other subsidiary or affiliated entity or agent is unlawfully holding, under any title, real estate in Puerto Rico, The People of Puerto Rico may, at its option, through the same proceedings, institute in its behalf the confiscation of such property, or the alienation thereof at public auction, within a term of not more than six months counting from the date on which final sentence is rendered.

"In every case, alienation or confiscation shall be through the corresponding indemnity as established in the law of eminent domain."

Section 2.—Section 6 of the Act entitled "An Act establishing *Quo Warranto* proceedings," approved March 1, 1902, is hereby amended as follows:

"Section 6.—In case any person or corporation against whom any such petition is filed, is adjudged guilty, the court may give judgment of ouster against such person or corporation from the office or franchise to which the petition refers, and fine such person or corporation for usurping, intruding in, or unlawfully holding and executing such office or franchise, and also give judgment in favor of the defendant for the costs of the prosecutions; *Provided*, that whenever sentence is pronounced declaring that the defendant has usurped or is unlawfully exercising the functions of any public office, said defendant must cease immediately in said office, and abandon the same; and if he fails to do so, the court, on petition of the Attorney General or of any person interested in the office, shall issue an order to the marshal compelling him to oust the defendant from office.

"Whenever, in the opinion of the court, it is satisfactorily established that the corporation or corporations have performed acts or exercised rights not conferred by law, or in violation of the express provisions thereof, the judgment

entered shall, in case the defendant is a domestic corporation, decree the dissolution thereof and the prohibition to continue doing business in the country; and in the case of a foreign corporation, the nullity of all acts done and contracts made by the defendant corporation or entity; and in addition, said judgment shall decree the cancellation of every entry or registration made by the said corporations in the public registries of Puerto Rico; and when the decree of nullity affects real property and The People of Puerto Rico has chosen to confiscate it or orders it sold at public auction, the final judgment shall fix the reasonable price to be paid for said property. For these purposes, the just value of the property subject to alienation or confiscation shall be fixed in the same manner as it is fixed in cases of condemnation proceedings.

"The violation of an order prohibiting the doing of business after final judgment is rendered shall be punished by a maximum fine of five hundred (500) dollars for each day such entity may continue in operation, enforceable on the property of the entity, and the persons representing it shall be guilty of contempt of court, punishable by imprisonment for a minimum term of from one to six months in jail.

"Whenever judgment is rendered in favor of any defendant, such defendant may recover costs from the plaintiff, including a reasonable attorney's fee.

"For the purpose of fixing the value of the property, The People of Puerto Rico, through its agents or representatives, is authorized to enter the properties the object of the controversy, whatever their nature or condition may be."

Section 3.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 4.—This Act, being of an urgent character, shall take effect immediately after its approval.

Approved, August 7, 1935.

Act No. 47, approved August 7, 1935, Laws of 1935, Special Session, pp. 530-536, copied in full in the Record here ("Exhibit No. 12", R. 240-243), amends Sections 2 and 6 of the Quo Warranto Law of March 1, 1902 (ante, p. 68; Sec. 6

already amended by the Act of 1931, Footnote 1, ante p — , amendment concerning public offices, immaterial here), so as to read in pertinent parts:

Section 2.—In case any person should usurp, or unlawfully hold or execute any public office * * *, or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises rights not conferred by law, the Attorney General, or any prosecuting attorney of the respective district court, either on his own initiative or at the instance of another person, may file before any district court of Puerto Rico a petition for" (leave to file)[3] "an information in the nature of Quo Warranto in the name of The People of Puerto Rico; or whenever any corporation, by itself or through any other subsidiary or affiliated entity or agent, exercises rights, performs acts, or makes contracts in violation of the express provisions of the Organic Act of Puerto Rico or of any of its statutes, the Attorney General or any district attorney, either on his own initiative or at the instance of another person, may file before the Supreme Court of Puerto Rico a petition for" (leave to file)[3] "an information in the nature of Quo Warranto in the name of the People of Puerto Rico; and if from the allegations such court shall be satisfied that there is probable ground for the proceeding, the court may grant the petition and order the information accordingly. * * *

Section 6.—In case any person or corporation against whom any such petition is filed, is adjudged guilty, the court may give judgment of ouster against such person or corporation from the office or franchise to which the petition refers, and fine such person or corporation for usurping, intruding in, or unlawfully holding and executing such office or franchise, and also give judgment in favor of the defendant for the costs of the prosecutions; * * *

Whenever, in the opinion of the court, it is satisfactorily established that the corporation or corporations have performed acts or exercised rights not conferred

by law, or in violation of the express provisions thereof, the judgment entered shall, in case the defendant is a domestic corporation, decree the dissolution thereof and the prohibition to continue doing business in the country; and in the case of a foreign corporation, the nullity of all acts done and contracts made by the defendant corporation or entity; and in addition, said judgment shall decree the cancellation of every entry or registration made by the said corporations in the public registries of Puerto Rico; and when the decree of nullity affects real property and The People of Puerto Rico has chosen to confiscate it or orders it sold at public auction, the final judgment shall fix the reasonable price to be paid for said property. For these purposes, the just value of the property subject to alienation or confiscation shall be fixed in the same manner as it is fixed in cases of condemnation proceedings.

[No. 160]

[*Approved, May 14, 1943*]

AN ACT

To Amend Section 58 of the Land Law of Puerto Rico, Approved April 12, 1941, and for other Purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Section 58 of The Land Law of Puerto Rico, approved April 12, 1941, is hereby amended to read as follows:

"Section 58.—The acquisition, holding, or any other form of direct or indirect control of land in excess of five hundred (500) acres by any artificial person, as said term is defined in this Act, is hereby declared unlawful. This provision shall be applicable to any extension of land, which, jointly with such land as the acquirer may hold, possess, control or exploit at the time of the acquisition, aggregates over five hundred (500) acres. Artificial persons may, however, loan funds upon land security, and acquire land when necessary to collect loans, but they shall, within five years after receiving the title thereto, alienate such land as they may hold in excess of five hundred (500) acres.

"Actions filed for violation of this section shall be governed by the general provisions of the Code of Civil Procedure and by the special provisions of the Code of Civil Procedure and by the special provisions of the *Quo Warranto* Act relative to corporations engaged in agriculture and holding land in excess of five hundred (500) acres; *Provided, therefore,* That when it should be established that an artificial person, as said term is defined in this Act, has performed acts in violation of the provisions of this section, the judgment shall, in case the defendant is a domestic corporation, decree the dissolution thereof, and in the case of a foreign corporation, the prohibition to continue doing business in the country; and the nullity of all acts done and contracts made by the artificial person; the cancellation of every entry or registration made by same in the public registries of Puerto Rico; and a fine may be levied.

"The People of Puerto Rico may, at its option, demand, in the proceeding itself, the confiscation in its favor of the real property of the defendant entity, or the alienation of said property at public auction within a period of not more than six (6) months reckoned from the date on which final judgment is entered.

"The confiscation or alienation shall in every case be made upon proper compensation in the manner established by the Condemnation Proceedings Law. The Supreme Court is hereby empowered to appoint receivers who, in behalf and with the approval of said Supreme Court, shall be exclusively in charge of the liquidation and sale of the property of the artificial person or persons affected. The receivers shall give preference in the purchase of land to the Land Authority of Puerto Rico, which shall hold preferential option for the fair value of the property fixed in the final judgment. The receivers shall have the duty of beginning the sale of the land within a period of not more than six (6) months after the receivership is established. The Land Authority shall have a preferential right to purchase said lands for their fair value within a period of not to exceed one year, during which no sale may be made to any other person or entity. This period of one year may be extended for another year on authority of the Governor. Upon the expiration of such period or periods, the land shall be sold

at public auction. The Authority shall have priority or preference for the purchase of land at the public auction in those cases where it bids a price equal to that bid by the highest bidder. And the edicts published shall so state.

"The violation, after a final judgment is entered, of an order prohibiting the doing of business, shall be punished by a maximum fine of five hundred (500) dollars for each day that the entity continues to exercise its functions, recoverable from the property of the entity; and the persons representing such entities shall be held in contempt of court punishable by a minimum penalty of imprisonment in jail for a term of from one to six months.

"For the purpose of fixing the value of the property, The People of Puerto Rico is authorized to enter the property or holding the object of controversy."

Section 2.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 3.—This Act, being of an urgent character, shall take effect immediately after its approval.

Approved May, 14, 1943.

APPENDIX II.

A Chronological Analysis of the Facts.

The true facts as they arise from the documentary and oral evidence weighed by the Insular Courts, undisputably show:

1.—On March 23, 1932, Elvira Olivieri Commins owed to the civil partnership Mario Mercado e Hijos, the sum of $41,256.89 (Rec. 324) and in payment thereof she subscribed on that date four promissory notes, the payment of which notes she secured with a voluntary mortgage constituted by her upon her jointly owned interests, an undivided half share, in each of the estates "Indios" and "Juanita". In payment of her debt, Elvira Olivieri Commins endorsed and delivered to partnership Mario Mercado e Hijos the four promissory notes (Rec. 424) aforesaid. It so appears from Public Deed No. 13 of March 23, 1932, executed before Notary Public Fernando Zapater Martinez.

2.—At the time the above negotiations took place, partnership Mario Mercado e Hijos was enjoying the possession of the undivided half shares belonging to Elvira Olivieri Commins in each of the "Indios" and "Juanita" properties under a contract of lease and was paying an annual lease rental of $4,100.00 (Rec. 326). The interests accruing from the principal amount owed by Elvira Olivieri Commins were retained by partnership Mario Mercado e Hijos from the lease rentals referred to (Rec. 326).

3.—Santia Olivieri Commins, a sister of Elvira, also owed to partnership Mario Mercado e Hijos, and in payment of her debt, she also subscribed and delivered promissory notes to the said partnership (Rec. 225-259).

4.—In the mortgage deed executed by Elvira Olivieri Commins to secure the four promissory notes she had endorsed to partnership Mario Mercado e Hijos, as well as in the deed executed by Sanita Olivieri Commins to secure the promissory notes she had also endorsed to partnership Mario Mercado e Hijos in payment of her debt, there were option clauses to purchase and to lease their undivided joint interest in the "Indios" and "Juanita" estates, as well as identical clauses—Clause 11—granting partnership Mario Mercado e Hijos the right to intervene in any partition that the said sisters Elvira and Santia Olivieri Commins, may carry out in connection with their "Indios" and "Juanita" properties. As regards clause 11 in Santia Olivieri Commins' contract, see Rec. 230-231; and, as regards that clause in Elvira Olivieri Commins' contract, see Rec. 235-236.

5.—On May 9, 1933 by public deed executed before Notary Fernando Zapater, partnership Mario Mercado e Hijos conveyed and assigned to the Heirs of José Tous Soto the four promissory notes that had been subscribed by Elvira Olivieri Commins, and the said partnership subrogated the assignees to its rights in the same degree and priorities by delivering said promissory notes to the Heirs of José Tous Soto (Rec. 397-411). On assigning the mortgage credit the only reservation then made by partnership Mario Mercado e Hijos was the right to retain three-fourths of one per cent annually of the interest accruing from the principal owed by

the mortgage debtor, whose retention Mario Mercado e Hijos made in consideration of the obligation assumed therein by Mario Mercado e Hijos to pay the interest to be accrued monthly instead of semi-annually as called for by the mortgage contract (Rec. 407).

6.—Neither in the aforesaid deed of assignment of the mortgage credit, nor in the petition filed in the District Court of Ponce, requesting judicial authorization to invest money belonging to the four minor children of José Tous Soto and to another one that was incapacitated, who were members of the succession of José Tous Soto was it expressly or otherwise stated that partnership Mario Mercado e Hijos had reserved any right whatsoever as regards the option to purchase and sell and to lease (Rec. 384-396).

7.—Notary Public Fernando Zapater Martínez, who was at the time attorney for partnership Mario Mercado e Hijos, served notice on Elvira Olivieri Commins of the assignment of the mortgage credit made by Mario Mercado e Hijos to the Heirs of José Tous Soto. Elvira Olivieri Commins was not informed as to any alleged reservation made by Mario Mercado e Hijos as regards the option clause to purchase and sell and to lease (Rec. 412-424).

8.—The deed of assignment of the mortgage credit was recorded in the Registry of Property of Ponce and the option clause to purchase and sell and to lease passed with the mortgage to the Heirs of Tous Soto (Rec. 460-465).

9.—Rafael Barletta, a relative and agent of Elvira Olivieri Commins, was negotiating with partnership Mario Mercado e Hijos the purchase by said partnership of the properties belonging to Elvira Olivieri Commins, and the continuance of the lease on those properties. There appears nothing either from the documentary or from the oral evidence in the record preventing Elvira Olivieri Commins from selling or leasing her "Indios" and "Juanita" properties. She was not compelled to seek the consent of partnership Mario Mercado e Hijos to sell or to lease those properties due to the fact that said partnership, since August 20, 1933, had parted with the option clause to purchase and sell and to lease embodied in the mortgage deed (Rec.

397-412). From that date on, i.e., from August 20, 1933, the option belonged to the Heirs of José Tous Soto to the exclusion of any other person or persons.

10.—On August 20, 1936, by public deed to that effect, the properties "Indios" and "Juanita" were divided between the sisters Santia Olivieri Commins and Elvira Olivieri Commins (Rec. 225). Partnership Mario Mercado e Hijos, being at that time the mortgage creditor of Santia Olivieri Commins, appeared in said deed by reason of the fact that, in the mortgage contract that Santia Olivieri Commins had executed to secure the payment of the promissory notes she had subscribed and endorsed to the referred to partnership, there was an option in favor of Mario Mercado e Hijos to purchase and sell and to lease the mortgaged properties.

The appearance had the purpose of making certain explanations in the deed in order not to become liable as to certain rights of adojining land owners (Rec. 255-256). Nowhere in the deed of partition Elvira Olivieri Commins made acknowledgment of any rights whatsoever in favor of partnership Mario Mercado e Hijos (Rec. 225-258).

11.—On March 4, 1937, the Heirs of José Tous Soto, by their Attorney Fernando Zapater, who also was the attorney for partnership Mario Mercado e Hijos, appeared before the District Court of Ponce requesting judicial authorization to cancel the mortgage that encumbered the properties of Elvira Olivieri Commins and secured the four promissory notes that partnership Mario Mercado e Hijos had conveyed and assigned, more than three years before, to the Heirs of José Tous Soto. The District Court of Ponce was not informed of any reservation whatever made by Mario Mercado as to the option clause to purchase and sell and to lease embodied in the mortgage contract securing those promissory notes, and the said District Court of Ponce, having at hand the deed of assignment of the mortgage credit to which the Heirs of Tous Soto were a party, after weighing the evidence presented at the hearing had in the proceedings before it, authorized the cancellation in full of the mortgage (Rec. 425-541).

12.—The Heirs of José Tous Soto, i. e., all the members constituting the succession, appeared before Notary Fernando Zapater, and by deed of Mareh 8, 1937, cancelled in full the mortgage encumbering the "Indios" and "Juanita" properties belonging to Elvira Olivieri Commins (Rec. 312-321). The second clause of said deed reads as follows:

> "Second:—By virtue of the terms of the foregoing clause, Mrs. Belén González, in her own right and in the representation assumed by her herein, conformable to the order of the District Court for the Judicial District of Ponce already transcribed, Doña Ana-Rosa, Doña Alicia, Doña Celia, Doña Belén-Mariá, Doña Gladys and Don Jorge Tous González, the first three parties with the express consent of their respective spouses Don Vicente Usera, Jr., Don José B. Carrión and Don Ignacio Maldonado, acknowledge as fully cancelled and extinguished the mortgage constituted by deed No. 13, dated March 23, 1932, executed before notary José Tous Soto, the attesting notary in said execution acting as a substitute, in favor of the partnership Mario Mercado e Hijos, and conveyed subsequently to the parties hereto by said deed No. 33, dated May 9, 1933, before me, such cancellation to be recorded in the proper registry of property conformable to the wish and consent of the parties" (Rec. pp. 318-319).

13.—The deed of cancellation of the mortgage aforesaid, executed under the authority given by the District Court of Ponce caused and brought about the full cancellation in the Registry of Property of the record entries of the mortgage securing the four promissory notes that up to May 9, 1933 had belonged to Mario Mercado e Hijos and from that date on to the date in which they were paid, the property of and belonged to the Heirs of José Tous Soto (Rec. 460-465).

14.—After its cancellation in the Registry of Property of Ponce, nothing remained of the mortgage credit therein. There was nothing then in such registry preventing Elvira Olivieri Commins, nor there was anybody in position to prevent her, from paying a debt guaranteed by said mortgage,

mortgage that had only brought her embarrassments and worries. After paying the mortgage debt by deed executed before Notary Luis López de Victoria on March 9, 1937, Elvira Olivieri Commins sold her "Indios" property to the defendants Lluberas-Passarell for $40,000.00 that they paid to her (Rec. 260-267). From May 9, 1933 on, partnership Mario Mercado é Hijos had no status or standing to bring any action in connection with the option clause embodied in the mortgage contract securing the payment of the four promissory notes subscribed by Elvira Olivieri Commins, inasmuch as on that date said partnership had fully conveyed and assigned to the Heirs of José Tous Soto the mortgage credit represented by the said four promissory notes and the mortgage securing those notes (Rec. 397-411).

15.—The statements attributed to Elvira Olivieri Commins, as made after the sale of her "Indios" property to the Lluberas-Passarell brothers, cannot produce any effect or operate against the title of the defendants Lluberas-Passarell. The district (trial) Court of Ponce on weighing the testimony of plaintiff's witnesses in the instant case, gave no credit to their testimony. On the contrary, the trial court believed the testimony of Elvira Olivieri Commins, who denied that she had made anyone of the statements that plaintiff attributed her and testified also that the said witnesses for plaintiff came to her home in a violent manner (Rec. 100-101).

16.—The claims made by petitioner Mario Mercado e Hijos to rescind the contract of sale were dismissed by the District Court of Ponce and by the Surpeme Court of Puerto Rico, after said courts had construed and applied the local statutes applicable to the indisputable facts arising from documents that, presented in evidence, are drawn in clear and precise terms, and from testimonies appreciated and weighed by a judge on whom no imputation of partiality, passion or prejudice in weighing the evidence is made and no such partiality, passion or prejudice appears from the record.

17.—Rule 39(b) of the Circuit Court of Appeals for the First Circuit is valid. Such rule did not deprive petitioner

of any of his rights under the Constitution or other laws in force. Since May 9, 1933, when the petitioner Mario Mercado e Hijos conveyed and assigned to the Heirs of José Tous Soto the four promissory notes that Elvira Olivieri Commins had subscribed and secured with a mortgage on her properties, without petitioner having reserved any right as regards the option clause to purchase and sell and to lease embodied in the mortgage contract as an integral part thereof, the said partnership Mario Mercado e Hijos lost all rights to claim, or to bring an action, in connection with the referred to option clause, and has no *status* or standing before any court either to bring such action or to raise before this Honorable Supreme Court the validity of Rule 39(b) of the Circuit Court of Appeals for the First Circuit.

18.—The judgment rendered by Judge Sepúlveda of the District Court of Ponce (Rec. 45) that was unanimously affirmed by the Supreme Court of Puerto Rico (Opinion delivered by Mr. Chief Justice del Toro, Rec. 488), and later on appealed to the Circuit Court of Appeals for the First Circuit (appeal dismissed, Rec. 516) is correct and conforms to the laws and to the facts in the case as shown by the evidence weighed and believed by impartial judges learned in local statutes applicable to those facts.

IN THE SUPREME COURT OF PUERTO RICO

No. 2

THE PEOPLE OF PUERTO RICO, Plaintiff,

v.

MARIO MERCADO E HIJOS, Defendant.

Dissolution of Partnership.

COMPLAINT

Now comes The People of Puerto Rico, by its Acting Attorney General, and alleges:

1. That defendant "Mario Mercado e Hijos" is a civil agricultural partnership, domiciled in the city of Ponce, Puerto Rico, dedicated to the planting of cane and the proc-

essing of sugar as its principal activities, and was constituted on June 13, 1916, in accordance with the Codes of Puerto Rico by public deed number 36, executed in the city of Ponce, Puerto Rico, before notary Antonio F. Castro, modified by public deeds number 99, executed in the same city before notary José Tous Soto on June 11, 1926; number 10 executed in the same city before notary Benigno Fernández Garcia on July 7, 1935; and number 11 executed before the same notary in the same city on July 11, 1935.

2. That in violation of the statutes and agrarian policies of The People of Puerto Rico, defendant has owned since it was constituted, dedicating them to agricultural activities, lands in excess of five hundred acres, and is at present owner in fee simple of about 9,800 cuerdas, equivalent to about 9,520 acres, dedicated to the same activities, distributed among the municipalities of Ponce, Juana Díaz, Peñuelas, Guayanilla, San Germán, Lajas, and Sabana Grande.

Wherefore The People of Puerto Rico prays that the Court render judgment ordering the dissolution of defendant "Mario Mercado e Hijos", and imposing upon it the corresponding fine, together with any other relief in law and in equity as may be proper.

San Juan, Puerto Rico, November 4, 1943.

(Signed) M. Rodríguez Ramos,
Acting Attorney General.

Miguel Guerra-Mondragón,
Rafael Rivera Zayas,
Luis Venegas Cortés,
Nilita Vientós Gastón,
Associate Counsel.

Certificate of Translation

I, Ignacio Rivera, Assistant Secretary and Interpreter of the Supreme Court of Puerto Rico, Do Hereby Certify:

That the foregoing is a true and faithful translation of the complaint filed by The People of Puerto Rico on November 4, 1943, in the above-entitled case, as the same appears from the original record of the case on file in the office of the Secretary-Reporter.

In Testimony Whereof, I have signed this certificate at San Juan, Puerto Rico, this 17th day of March, 1944.

IGNACIO RIVERA,
Assistant Secretary and Interpreter,
Supreme Court of Puerto Rico.

SECRETARY-REPORTER'S CERTIFICATE

I, Joaquín López, Secretary-Reporter of the Supreme Court of Puerto Rico, Do Hereby Certify:

That the foregoing is a true and correct copy in translation of the complaint filed by The People of Puerto Rico on November 4, 1943, in the above-entitled case; that Ignacio Rivera, who signs the foregoing certificate, is the Assistant Secretary and Interpreter of this Court; and that the foregoing translation has been made by him as shown by his certificate above set forth.

In Testimony Whereof, at the request of Leopoldo Tormes, Esq., I have hereunto set my hand and affixed the seal of this Court, after duly cancelling internal revenue stamps in the amount of two dollars, at San Juan, Puerto, this 17th day of March, 1944.

JOAQUÍN LÓPEZ,
Secretary-Reporter
Supreme Court of Puerto Rico.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 497.

MARIO MERCADO E HIJOS, *Petitioner*,

v.

ELVIRA OLIVIERI COMMINS, ET AL., *Respondents*.

ORAL ARGUMENT ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.*

WILLIAM CATTRON RIGBY,
PEDRO M. PORRATA,
Attorneys for Petitioner.

RIGBY, LEON and WEILL,
FRED W. LLEWELLYN,
Of Counsel.

* Reported by H. S. Middlemiss, Columbian Bldg., Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OCTOBER TERM, 1943.

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MARIO MERCADO E HIJOS, *Petitioner,*

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ELVIRA OLIVIERI COMMINS, ET AL., *Respondents.*

ORAL ARGUMENT ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.*

Washington, D. C.,
April 24, 1944.

The above-entitled cause was argued in The Supreme Court of the United States, commencing at 3:28 o'clock p. m. on Monday, April 24, 1944.

Before:

HONORABLE HARLAN F. STONE, the Chief Justice; and
HONORABLE OWEN J. ROBERTS;
HONORABLE HUGO L. BLACK;

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* Reported by H. S. Middlemiss, Columbian Bldg., Washington, D. C.

HONORABLE STANLEY F. REED;
HONORABLE FELIX FRANKFURTER;
HONORABLE WILLIAM O. DOUGLAS;
HONORABLE FRANK MURPHY;
HONORABLE ROBERT H. JACKSON; and
HONORABLE WILEY RUTLEDGE, Associate Justices, there being

Present:

On behalf of the Petitioner:

WILLIAM CATTRÓN RIGBY, FRED W. LLEWELLYN, and PEDRO M. PORRATA, ESQUIRES; and

On behalf of the Respondent:

(The case was submitted without oral argument for the Respondent.)

Thereupon the following proceedings were had and oral arguments made:

PROCEEDINGS AND ORAL ARGUMENTS

The Chief Justice: Case No. 497.

The Clerk of the Court: Counsel for the petitioner are present.

The case is submitted for the respondent.

The Chief Justice: Proceed, please.

ORAL ARGUMENT ON BEHALF OF THE PETITIONER

By Colonel William Cattron Rigby

Colonel Rigby: If the Court please, this is the other case of course, involving the rule which we have been talking about in the first case.

We are very sorry to find that we do not have any opponents here to argue this case against us.

My associate, Mr. Porrata, is here with me and will take part in the argument relating to the special matter he is interested in.

This involves Rule 39 (b) of the Circuit Court of Appeals of the First Circuit and comes here because, in this case, the Circuit Court refused to go into the case on its merits and disposed of it summarily on the filing of the statement of appeal under this rule quoted at Page 2 of our petition for certiorari, and that rule reads:

> "In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal, that the judgment appealed from is 'inescapably wrong' or 'patently erroneous'. (Sancho Bonet v. Texas Co., 308 U. S. 463 (1940).) The court will entertain a motion by the appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was neither 'inescapably wrong' nor 'patently erroneous,' and consequently should not be disturbed by this court. Such motion, which may be united in the alternative with a motion to dismiss the appeal, may be filed within twenty days after the filing and serving of the statement on appeal. A brief in support thereof may be filed and furnished in the manner specified by Rule 25. The court may, however, upon its own motion, dismiss the appeal or affirm the judgment appealed from where the law and justice of the case so require; or, if the case is of such character as not to justify extended argument, the court may order the cause set down for immediate hearing."

Now, in this particular case, if the Court please, which is a land case in which there are rather complicated facts, there was a transcript of the record that went to the Circuit Court of Appeals and, as it is printed here, it makes 515 printed pages which would be a thousand or something in the typewritten form.

The Court will readily understand the difficulty in presenting such a record in typewritten form without being permitted to print it and, in a summary form a sufficient statement on appeal to answer the requirements of this rule and to give the Circuit Court of Appeals any real, fair, notion of whether there is the kind of case that should

be gone into on appeal by that court, if it is going to really exercise the statutory jurisdiction that is given it by the Congress in appeals from the Supreme Court of Puerto Rico.

Now, this particular case, we think it is a fair example, and I might say that there are other cases in which as we see it and as we see it in this case, there is a complete, practical, denial of justice because in order to prove to the Circuit Court of Appeals, in a preliminary way to meet their requirements, that the appellant shall show in his statement on appeal that the judgment appealed from is inescapably wrong or patently erroneous, there must be a thorough and careful analysis of the evidence, questions raised, and that sort of thing, and if you do not do it, of course, you are not showing and cannot show that it is inescapably wrong; and if you do do it you are required really to prove the whole case, prepare it just as carefully and as thoroughly, or more carefully than if you had a printed record, and you have to do it on the basis of a typewritten record,—only one copy which you hope may be passed around among all the judges.

Mr. Associate Justice Black: What is the difference in that rule and the rule that provides for pre-trial procedure?

Were the parties notified?

Colonel Rigby: The motion was made to dismiss.

Mr. Associate Justice Black: Was a notice given?

Colonel Rigby: And without any hearing there was a dismissal.

Mr. Associate Justice Black: Was there notice given?

Colonel Rigby: There was a notice given and opportunity to file a brief.

Mr. Associate Justice Black: Was any brief filed?

Colonel Rigby: No brief was filed, I believe. I was not in the case at that time, but there was a careful statement on appeal, not, however, a full statement of the case.

Mr. Associate Justice Black: What is the difference between the pre-trial procedure and the motion for summary

judgment, and this, where an effort is made to see if any substantial issue exists between the parties?

Colonel Rigby: The ordinary pre-trial procedure makes it possible for you to go before the Judge and you have an opportunity to present the question informally and to answer the questions raised, and you have an opportunity to say what you are willing to admit, and that kind of thing, and thresh the thing out in an informal way.

Here you have no opportunity for a personal hearing at all.

You are deprived of any sort of personal hearing.

The Chief Justice: Is that true under the rule, or is that just the practice?

Colonel Rigby: The rule does not seem to contemplate it being set down for argument. The practice is not to.

The practice, as we understand it, is to cut you off on any case where it depends on careful analysis.

Mr. Associate Justice Black: You were given a chance to appear in this one, and you were given a notice to file a brief and point out what real point you had in the case.

Colonel Rigby: Of course, Mr. Justice Black. But that had to be done preliminarily, within twenty days.

Mr. Associate Justice Black: How long, when a man has a summary judgment motion, how long a time does the man have there?

Colonel Rigby: In an ordinary case he probably would not have much more, but if he has a case with a record involving a thousand pages, and a complicated record of evidence, he usually would be given an opportunity for hearing.

This is not, of course, a case in a trial court.

Mr. Associate Justice Black: Is there any less reason to give a man a final and complete hearing, with a right of oral argument, in a trial court and what he would have had in an appellate court?

Colonel Rigby: Perhaps it is the other way around.

It seems, Mr. Justice, to us—

Mr. Associate Justice Black (interposing): I do not mean to say that this rule is correct.

I am trying to find out what your judgment is.

Colonel Rigby: I would say if there is any difference they are more entitled to the hearing in the appellate court.

The Chief Justice: Were the questions involved here of Puerto Rican law?

Colonel Rigby: I beg your pardon.

The Chief Justice: Were the questions that were involved here questions of the construction of Puerto Rico law?

Colonel Rigby: And depending on the analysis of the facts, as we will show you in a moment.

The case is this.

The Mercado partnership, the petitioner here—

Mr. Associate Justice Rutledge (interposing): This rule does not prohibit applications for extension of time in necessary cases, does it?

Colonel Rigby: No, so far as I know.

Mr. Associate Justice Rutledge: Was any application made for an extension?

Colonel Rigby: So far as I know, no.

Mr. Associate Justice Rutledge: And there is no limitation in the length of the typewritten pages?

Colonel Rigby: No. That is practically the case.

You try the case as you would on final trial and argument. If you properly present it you must file a brief on the final case before you have an opportunity to have your record printed, you see.

Mr. Associate Justice Rutledge: You want to print it and they want it typewritten.

Is that the difference?

Colonel Rigby: We want an opportunity, Mr. Justice, for the usual time allowed for the preparation of a case on hearing.

Mr. Associate Justice Rutledge: If the rule does not prohibit it and if you don't apply for it, then what?

Colonel Rigby: The rule talks about twenty days:

> "Such motion • • • may be filed within twenty days after the filing and serving of the statement on appeal."

Of course, it is really a practical thing, largely.

Practically, it is understood by the attorney, as requiring you either to let the thing go in a very hasty way, or else go ahead and, in a preliminary way, the first thing, brief your case and present it just as fully as though you were presenting it on final argument, and even more fully, because you won't be permitted an opportunity for an oral argument at all. You must, at your peril, in your preliminary statement on appeal, absolutely show—the word is, or the phrase is "that the Court below was inescapably wrong"; and you must do that in a way that you can stand on without any opportunity for oral argument or reply brief or anything of that sort. It is requiring more of you—

Mr. Associate Justice Rutledge: Do you think your view should apply to all cases so that counsel in any case would be permitted the kind of a hearing you want, or do you say it should apply in some cases like yours?

Colonel Rigby: Of course, that is a practical question again, but as we see it, it is wrong to have a rule that for practical purposes requires—

Mr. Associate Justice Rutledge (interposing): But the rule is not unreasonable in its application to any case?

Colonel Rigby: As we see it, it is.

Mr. Associate Justice Jackson: What difference is there between that and this court's practice in dismissing an appeal on a preliminary statement if it does not appear that there is a substantial federal question involved?

Colonel Rigby: This is a requirement that there be a showing in all cases, not simply that a real question is involved, but that the court below is inescapably wrong.

Mr. Associate Justice Jackson: That is usually easier to show than a substantial question.

If you wish to demonstrate a frivolous decision, that is easy.

Colonel Rigby: That seems to absolutely prohibit anything except the extreme case. It amounts, as we see it, to an abrogation of the jurisdiction of the Circuit Court of Appeals in all cases except the extreme case where you can show on the face inescapably wrong.

Mr. Associate Justice Frankfurter: Is there a rule—I should know it—among the rules of the First Circuit about frivolous appeals?

Colonel Rigby: Oh, yes.

Mr. Associate Justice Frankfurter: What is the rule?

Colonel Rigby: I do not have it here, but there is such a rule and no one would question it.

Mr. Associate Justice Frankfurter: This gets down to the basis of frivolous appeal, doesn't it?

Colonel Rigby: No. Quite the contrary. Instead of our being simply required to show that we have a reasonable—

Mr. Associate Justice Frankfurter (interposing): I am not saying the criteria for frivolity is the correct one, but I say this is a special rule of Puerto Rican frivolity. Am I correct?

Colonel Rigby: It is more than that.

Mr. Associate Justice Frankfurter: As to the justification; as to the basis.

The Court here has made a special rule defining when appeals from the Puerto Rican Court are frivolous.

Colonel Rigby: You may put it that way.

We object to it because it is a special rule for Puerto Rico. I think that it plainly is deprivation of the equal protection of laws to make this special drastic requirement as to appeals coming from Puerto Rico, and not the same requirement if coming from another place. It is entirely wrong.

But the answer to that question of Mr. Justice Jackson is that this rule is putting the cart before the horse: Instead of simply requiring us to show that we have reasonable

grounds that we desire to show to the Court, upon which we think we can show on the hearing, that the decision below was inescapably wrong, they require us in advance, in our statement in appeal, absolutely to show, in advance, that it was inescapably wrong, which means that we have practically to prove the whole case in advance.

Mr. Associate Justice Rutledge: Are you attacking the rule of the Circuit Court of Appeals or the decision of this Court?

Colonel Rigby: The rule of the Circuit Court of Appeals.

Mr. Associate Justice Frankfurter: Was there a construction by rule of what this Court intended to have done?

Colonel Rigby: That is what it comes to, their misunderstanding of the direction of this Court.

Mr. Associate Justice Black: Suppose the ruling were not inescapably wrong or manifestly wrong.

Colonel Rigby: It is pretty much the same thing.

Mr. Associate Justice Black: You presented the Texas case, if I recall.

Colonel Rigby: Yes.

Mr. Associate Justice Black: What is the language?

Let us suppose the rule of the First Circuit was your language one hundred per cent, and they provided just what they do here that they wanted you to let them know in advance whether or not you had a real case within the rule, and required you to issue notice and serve a brief on the other party, and so forth, would that be a good rule?

Colonel Rigby: With a little modification, if I may say.

If they simply required that we show that we have reason to believe that we have grounds that we want to present on which we think we can show that the decision below was wrong, whether you say "inescapably" or "just wrong"—

Mr. Associate Justice Black (interposing): But where does the rule fall short of that?

Colonel Rigby: The rule says not merely that you present—

Mr. Associate Justice Black (interposing): Where is it printed?

Colonel Rigby: On Page 2.

Mr. Associate Justice Black: Of your brief?

Colonel Rigby: Of our petition for certiorari, in case No. 497.

Mr. Associate Justice Black: Page 2?

Colonel Rigby: Page 2 of the petition for certiorari.

Mr. Associate Justice Black: Where does it fall short of what you think would make it a good rule?

Colonel Rigby: It starts out by saying:

> "In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal that the judgment appealed from is 'inescapably wrong' or 'patently erroneous'."

Now, we think if any rule of that kind were to be adopted it ought simply to require that the appellant show in his statement on appeal grounds that he desires to present upon which he thinks that he can show that the court below was wrong.

In other words, he should not be required to show in his statement on appeal absolutely everything that he is going to present in his argument; he should be required to show simply, as in a pleading, the grounds on which he thinks he can show it when he is permitted to come before the Court and prove it, and all that; that he has grounds that he wants to present; that he has a question that he wants to present that is a reasonable question, and that he has reasonable grounds for arguing that the Court below was inescapably wrong. He should have that right, and not be foreclosed and required, absolutely in advance, to try his whole case, before he has had an opportunity to present his printed record, or to have the usual time to digest his case, and to present his brief, and to be heard in oral argument.

That is the meat of my real objection to the form and to the substance of this rule.

Mr. Associate Justice Black: I cannot see that they required that in this particular case.

Colonel Rigby: Apparently they did, as we see it.

Mr. Associate Justice Black: You did not appear at all?

Colonel Rigby: I, personally, did not.

We appeared, filed the statement on appeal, complied with the rule so far as we could; and they held that it was not sufficient.

Now, we believe that this is a very strong case for showing that it was unjust to permit the thing to go off, requiring the thing to go off without hearing.

Mr. Associate Justice Jackson: Can you quite say "it went off without hearing"?

In your statement of points you file eight points on which an appeal is desired. They seem to me to indicate what is involved because, as far as I understand you say, under point 7:

> "The Supreme Court of Puerto Rico committed plain error of law in not adopting the interpretation placed by the parties themselves through their own conduct upon the covenant of March 23, 1932, to the effect that the personal privileges granted to Mario Mercado E Hijos in the said covenant did not follow the mortgage notes in the hands of the holder in due course."

You want to reargue the evidence on that?

Colonel Rigby: Yes.

Mr. Associate Justice Jackson: That is perfectly plain. I do not see why that should not be amplified in order for the Court to say "review of evidence."

Then, in addition to your statement of points, there is a statement on appeal, a number of pages, that amplifies the propositions that are desired to be presented.

I do not understand that this was not sufficient or that you are precluded from presenting more.

Colonel Rigby: The trouble is we are not given any opportunity to know whether or not that will be sufficient.

If we make the complete proof as long as you would in arguing this on final hearing, that is one thing.

If you come from any other court but the Supreme Court of Puerto Rico you have an opportunity to come in in the usual way, to present your brief and, when your opponent replies to your brief, to file a reply brief and to be heard on argument.

Mr. Associate Justice Jackson: Yes. But there are very valid reasons for a court not bringing lawyers and parties from Puerto Rico at times like this particularly unless there is a pretty substantial question that, on the face of it, does present a case.

Colonel Rigby: I am afraid I cannot take more time on that. My time is running.

We think this was a case where there was a real abuse, because we were not permitted an opportunity to really analyze the case.

Mr. Associate Justice Douglas: Are you suggesting that we could do something about this rule?

Colonel Rigby: Yes, if the Court please.

Mr. Associate Justice Douglas: We can do something about the case.

What about the rule?

Colonel Rigby: No. About the particular case. And we believe, of course, the Circuit Court of Appeals will be very glad to follow the indication of this Court if it has misunderstood the rule of this Court, as we think it has done, as to the deference to be shown to the decisions of the lower court.

We do think, as we said in the other case, that the decision of this court means, simply, that if there is reasonable logic behind the decision of the Insular Court, or if there are one, two, or three different solutions of the problem in the particular case and the Insular Court has adopted one, that although there may be one equally or even more reasonable, its decision ought not to be disturbed for that reason; but that if it is a case where it is clearly wrong, where you have simply either a right or a wrong, that in

such a case neither the Circuit Court of Appeals nor this Court is to abdicate its own judgment and not exercise its own judgment upon the decision in that case.

Mr. Associate Justice Black: What is the difference in "clearly wrong" and "inescapably wrong"?

Colonel Rigby: I don't think there is much difference.

Take the other case: You have to say either one thing or the other. Does "tenure of office during good conduct" mean "for life" or does it mean something else?

In this case there are several of these direct questions.

You cannot say that the decision of the Insular Court was logical or reasonable or right and may be sustained on that ground.

In this particular case the story is that the Mercado firm had an option in 1932, as part of their mortgage, a $40,000 mortgage; they were also lessees of the property under ten year leases;—option to buy or to lease if Mrs. Commins wanted to sell or lease; they had an option to do that upon the same terms that anyone else offered, and they were entitled to have thirty days notice of any offer that was made and to have an opportunity to exercise the option if they wanted to.

Mr. Associate Justice Frankfurter: As I understand it, the Circuit Court of Appeals did not listen to the merits of this controversy.

Colonel Rigby: That is right.

Mr. Associate Justice Frankfurter: Are you suggesting that we should now consider the merits of the controversy rather than consider whether or not the Circuit Court of Appeals of the First Circuit has deemed itself under an obligation to not consider questions that come up from Puerto Rico because they have interpreted certain words of ours to have almost a sacred or mathematical significance?

Colonel Rigby: That is it, and that is why we do want to have you consider the merits.

Mr. Associate Justice Douglas: They must have considered the merits because they affirmed the judgment.

Colonel Rigby: They simply affirmed under their Rule 39 (b).

Mr. Associate Justice Frankfurter: I understand that, but if their notion is that if something is mathematically or inescapably wrong then they must consider—you don't expect us to look independently, in this case, into the question of whether, in this case, the Circuit Court of Appeals have examined the merits, in any real sense of the term, and, if they have not examined the merits, whether we should examine the merits, rather than merely consider what the situation is on the part of the Circuit Court of Appeals with reference to Puerto Rico decisions.

You say that the Circuit Court of Appeals did not consider the merits.

Colonel Rigby: They did not.

Mr. Associate Justice Roberts: Your point is that someone should examine the merits.

Colonel Rigby: Yes. We asked for certiorari to be granted or mandamus to be granted to the Circuit Court of Appeals.

Mr. Associate Justice Frankfurter: They felt themselves under the pressure, which is not ostensible pressure, over them, in view of the jurisdictional act?

Colonel Rigby: That is why we asked for mandamus in the alternative; but, this court granted certiorari.

Mr. Associate Justice Frankfurter: It would not be the first time that this court would not examine so-called local questions which the lower court did not and would not; we simply sent the cases back.

Colonel Rigby: We think a very proper thing to do would be to send it back to that court and relieve us from the argument of the merits here in this Court.

Mr. Associate Justice Jackson: Which of the eight assignments of error, under your rule, do you say the Circuit Court of Appeals would be obliged to pass upon under your rule?

Colonel Rigby: I do not know that I am quite in a position, off the bat, to answer that question; they all run to the case, but certainly—

Mr. Associate Justice Jackson (interposing): Take the questions of local law.

Colonel Rigby: There are questions of local law.

Mr. Associate Justice Jackson: Your No. 1 is that the Supreme Court made an error.

Colonel Rigby: Yes.

Mr. Associate Justice Jackson: Then that they did not follow the law, on Page 496, of some case in California and a case in Oregon, and cases in Kansas and Minnesota, and so forth.

Colonel Rigby: That is a question of local law, and that we understand should be examined by the Circuit Court of Appeals under the jurisdiction given and imposed on it by Congress, by Judicial Code.

Mr. Associate Justice Jackson: You say that the local law should be examined?

Colonel Rigby: Surely.

Mr. Associate Justice Jackson: What about the weight of the evidence?

Colonel Rigby: The same provision as to the local law.

If the case is a case where the decision of the lower court was so clearly wrong, as we think it is.

In other words, the jurisdiction of the Circuit Court of Appeals is an absolute jurisdiction on appeal in the same way that the jurisdiction of a state Supreme Court, from a local court, is.

Now, it may be when they come to the end of the thing and, having examined it to determine whether or not they should reverse, it is very proper and right for them to consider the deference to be shown the local court on the question of local law in the same way as it is right for the Supreme Court of Virginia, for example, to pay deference to the decisions of the local court sitting in Roanoke on a local question, but that has nothing to do with the question of their duty, as we see it, to hear the case.

Now, they not having heard it, we are here, and we ask this court to hear it under the certiorari that has been granted, or to send it back to the Circuit Court of Appeals to hear it; and, being here apparently on the merits, we are prepared to argue the merits here and to show to this court that, as we see it, the decision of the Insular Supreme Court was wholly wrong; wholly wrong because here was a case where the option being given, as I said, and a trick being put up to avoid the option on the theory that because on the record of the assignment of the bearer promissory notes secured by the mortgage deed, of which the option was one clause, the record of the assignment of the transfer of the mortgage credits did not specifically reserve on the face of the record the option to the hands of the partnership,—the fact that it had not done so was taken advantage of by the vendor, by the optionor to give to her own members of her own family an opportunity to buy the property and to get away from the option.

What they did was this:

Knowing—and the District Court finds that they did know all about it: the Supreme Court of Puerto Rico finds that they did know all about it,—Mrs. Elvira Olivieri Commins had a talk with the mother of the Passarell family who wanted to buy this land, right between the lands of the two families, as a present to her son and daughters, and agreed—the evidence is practically undisputed—on the purchase of part, and lease of part of it.

Then, instead of notifying the Mercado partnership, as she was bound to do by the terms of the option, giving them thirty days to buy, they proceeded to go through a whole lot of machinery for the purpose of hiding the fact that they were selling to this family.

Mrs. de Delgado, the mother, put the money she wanted to use as a gift to her children into the hands of her son and he proceeded to make a nominal six months mortgage or lend on the nominal six months mortgage to Mrs. Commins and then she let him continue to hold it, and he then

took the money and proceeded to pay it over to the purchasers of the bearer notes and, behind the back of the partnership, without notifying them at all, in that way nominally cancelled the mortgage.

Having done that they thought: Now, we are entitled to buy the property free of the option; and they proceeded to put the purchase of record in that way; and then, of course, as soon as it came out—meantime she, Mrs. Commins, had been going ahead apparently negotiating with the Mercado partnership, if you please, to sell the property to them.

On the very day they were closing there was a conversation in the office of the attorney for all of them, Jose Sabater, when the manager of the partnership asked the son-in-law how the thing was going along and he said, "All right."

That same day they closed the cancellation of the other mortgage behind the backs of the partnership and then proceeded to put the thing of record; and a demand was made immediately by the partnership for opportunity to exercise the option and was denied; and this lawsuit resulted.

Now, it seems to us just as plain a case of a deliberate trick as could be, and the partnership was denied recovery by the Insular Court purely on the ground that they held that although there was complete knowledge of the option Section 152 of the Mortgage Law and Section 1418 of the Civil Code, which are simply and purely registry laws, not having been complied with,—it not appearing on the record, that there was the reservation to the partnership of the option in selling the mortgage notes, that they could not have the benefit of the option.

Now, that is against decision after decision of the Supreme Court of Puerto Rico, its holdings that the absence of record cannot be taken advantage of by one who knows all the facts, and, of course, contrary to the law of England as it has been since 1693, and of all the laws of the states, that no person can claim to be an innocent third party and take

advantage of that situation who knows and who does really and truly have knowledge of the whole thing.

My associate, Mr. Porrata——

Mr. Associate Justice Black (interposing): One question: Of what right do you say the rule, just the rule itself, has deprived you?

Colonel Rigby: Of the opportunity, if the Court please—

Mr. Associate Justice Black (interposing): To do what?

Colonel Rigby: Present these facts.

Mr. Associate Justice Black: You mean to file a brief? Has it denied you that right? Has it denied you the right to file a brief?

Colonel Rigby: It has denied us the right to file a brief in the usual way.

Mr. Associate Justice Black: I am not talking about that, about "in the usual way."

Did it deny you the right to file a brief and set out grounds?

Were you given notice for that purpose? And does the rule say you could file it?

Colonel Rigby: The rule provides that you may answer a motion to dismiss.

Mr. Associate Justice Black: Yes. Is there any reason why you could not file your brief before?

What I am getting at is simply this: Has it denied any other right than that of oral argument, if it has denied the right of oral argument?

Understand I am not talking about whether the rule was right or wrong, I am merely asking if it has denied you any right.

Colonel Rigby: It has denied us the right to present the case in the same way you present a case coming from any other court.

Mr. Associate Justice Black: Just to put it concretely: You had a right to file a brief. What privilege were you denied?

Colonel Rigby: If you came from another court you would have the time provided by the rules of the court for the preparation of your case.

Mr. Associate Justice Black: Was any objection made that the time was too short?

Colonel Rigby: In this particular case?

Mr. Associate Justice Black: Yes.

Colonel Rigby: No, I do not think that there was, so far as I know.

Mr. Associate Justice Black: Have you set up or has there been set up any statement here that they did not have long enough time in which to file a brief?

Colonel Rigby: There has been no specific statement of that kind; no.

The Chief Justice: How does this rule differ from a rule that an appeal may be dismissed as frivolous?

Colonel Rigby: It is the other side of the picture, Mr. Chief Justice.

Instead of requiring us to show a reasonable question for consideration only, it requires us, preliminarily, to show that we are entitled to win absolutely.

The Chief Justice: Not quite that.

When you measure the term "frivolous" you measure it in terms of existing law.

Colonel Rigby: Yes.

The Chief Justice: If the rule announced by this court is the right rule that the finding of the lower court must be affirmed unless it is shown to be inescapably wrong, that does not bar it as frivolous?

Colonel Rigby: That means after a hearing, after an opportunity has been had to present your case.

The Chief Justice: Do you have the right of argument on a motion to dismiss an appeal as frivolous?

Colonel Rigby: No. But as I understand it, the motion will be denied if you show there is a reasonable question to be considered.

The Chief Justice: Yes.

Colonel Rigby: But under this Rule 39(b) you have to show in advance not only a reasonable question, but you have to show that you are absolutely right and will win; and you must be able to show that the thing is inescapably wrong.

Mr. Associate Justice Black: Does it not require you to show that it comes within that degree of proof that you show the court can reasonably believe that you have a case?

Colonel Rigby: It does not say that.

Mr. Associate Justice Black: Does it not mean that?

Colonel Rigby: Practically much more. We have not merely got to show that we have a reasonable question to present, but that we are going absolutely to win.

Mr. Associate Justice Black: You mean that you must show that you have a reasonable ground to believe that it can be established that this thing is patently wrong or inescapably wrong?

Colonel Rigby: If the rule read that way we would not complain of it.

Mr. Associate Justice Black: What is your complaint? Do you think the rule means more than that?

Colonel Rigby: Yes.

Mr. Associate Justice Frankfurter: Suppose the Circuit Court of Appeals had said: As we read those who give us the law we must believe, for all practical purposes, that the decisions of the Supreme Court of Puerto Rico are all right. Suppose they said that?

Have they not said that that is what they think their duty is?

Colonel Rigby: That seems to be about what we think the rule means.

Mr. Associate Justice Frankfurter: An attitude of mind?

Colonel Rigby: Yes. But it may be an explanation of their attitude of mind.

As we see it it means that they think they are foreclosed.

Mr. Associate Justice Frankfurter: They have said that in so many words.

Colonel Rigby: Yes.

Mr. Associate Justice Frankfurter: Foreclosed not because on an examination of this particular case they find that the weight should go against the objection but that all the weight should go over and before what had been decided below because, as to Puerto Rico, they are supposed to be a rubber stamp.

That is your notion?

Colonel Rigby: That is our notion and we object.

Now, my associate, Mr. Porrata would like to present his views.

Oral Argument by Mr Porrata.

Mr. Porrata: From the decisions of the Court, of the Circuit Court of Appeals, it is clear that the whole thing arises from the Court being sore on account of reverses. It says so. That is the decision of the Court itself. It shows that the Court has not got the best consideration of the people of Puerto Rico. It was because there were some reverses and the Court thought that these reverses amounted to a declaration that there was no use to take appeals there. That is the situation and that is why that rule is being interpreted by the Court down there as a mathematical formula instead of as a legal formula, and when we get in there it highly prejudices our cases.

When Congress gave us the power, and we have not the right to go behind the will of the Congress, but when Congress gives us the right to go to the Circuit Court it says clearly that in all cases involving over $5,000 we have a right to go to the Circuit Court of Appeals; and, who can take that right away except Congress? That is my question. Or who can prejudice that right in any way?

The way I understood the rule as laid down by the Supreme Court is this way: You take the case, the Texas case, and look in the facts of the case and the law applicable and

the law interpretable and, after making an examination of that case, the Court reaches the conclusion that it is all right to allow that judgment to stand even though the Court may have a different opinion, maybe a little more reasonable, but, on its entire examination of the case, comparison, and distinguishing of all facts and those involved—for example in our case we sustain that the Supreme Court of Puerto Rico reached a conclusion of fact that under the constant jurisprudence of the Supreme Court of Spain, of the Supreme Court of Puerto Rico, of all the states of the Nation, of the English Court of Chancery, that judgment is wrong and should not be allowed to stand as a decision of the courts created by Congress for us.

Here is a man with notice that a man had an option.

The Supreme Court finds he had notice and deliberately violated an option and yet, after making that finding, holds in favor of that *mala fide* purchaser.

We cite all the cases from the Supreme Court of Puerto Rico, found as a matter of fact by the Supreme Court of Puerto Rico, and say that we have a right to a decision in our favor.

Now, we show that under the doctrine of the Supreme Court of Spain, interpreting the same provisions of the code, that no *mala fide* purchaser will be allowed to escape with his fruit. We show by the Chancery Court of England that no *mala fide* purchaser has been allowed to escape with the fruits of his *mala fide* conduct. Shall we say that the Supreme Court of Puerto Rico may have some reasoning for its decision, for its judgment?

Now, if that decision of that Court is contrary to the decisions of the Federal Courts in the States, to the decisions of the Courts in the Nation, to the decisions of the Supreme Court of Puerto Rico, and to the decisions of the Courts of Spain, we have a right to have that case overruled as being clearly erroneous.

Now the similar principle is this: This doctrine to respect the local courts is not something mysterious. In the case of findings of lower courts the courts of appeal won't

review those findings unless there is some justification. Now, when is it that there is a justification to review these findings? Well, in many cases the logical processes to reach these findings is found to be wanting in fact when there is overweight of the evidence and they are reviewed. There are more than twenty instances in which our Court of Appeals reviews the findings of our lower court. It does not say that they are going to review those findings blindly, and close our eyes. No. We have to go through with our thinking processes to reach a conclusion. Sometimes it may require other thinking. And every time a mathematical formula comes in that makes that phrase "inescapable" and "inescapably wrong" so dangerous, because unless it is applied with judicial significance and unless it is applied after an examination and a comparison of the questions involved it may lead you into error in the resolution of the case. For example, in this case the Supreme Court mentions a statute, the Code, the Mortgage Law, and yet we say that none of the statutes are involved in this case.

What is involved in this case according to my judgment and according to the judgment of the Petitioner? A statute—but a statute written where? A statute which is called in the States, in Spain, in Puerto Rico, the same where every good law is, that any *mala fide* purchaser will be not allowed to escape with his fruits of misconduct. And I will repeat to you a finding of the Court below to show you where it is that the insular Court has absolutely contrary to the statute which is universal—because in the application of this Rule, your Honors, we must distinguish between certain principles of law which are the same everywhere in the world, and certain principles of purely local law in the Island of Puerto Rico, and that is, you have as much reason to know the principles of logic as we do in Puerto Rico and when the question involved is not any matter particularly of local law but a matter of principle, are we going to say that we here will interpret that principle in a different way than everywhere in the world? I don't think so. The Supreme Court of Puerto Rico may

make a mistake. Here is the finding of the Supreme Court in this case:

In our case we filed an action to exercise an option and while that action was pending they filed an ejectment action against the partnership and that was tried in the District Court at Ponce and it was decided in our favor; that is in favor of the partnership. An appeal was taken to the Supreme Court and that was the Supreme Court of Puerto Rico, and that ejectment case was sustained in our favor and the Court made a finding in that case involving these same facts, and it says:

> "We do not wish to reach any conclusions in this case which might affect the decision of the questions on their merits, but we do state that the evidence of the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, * * * that they knew that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option."

Mr. Associate Justice Black: What page of the record is this ejectment suit referred to and is this quotation to be found?

Mr. Porrata: That quotation is from the judgment in the ejectment suit.

That is cited in our brief and the Supreme Court of Puerto Rico refers to it.

Mr. Associate Justice Roberts: What was this case?

This was a case to enforce an option, was it?

Mr. Porrata: Yes.

Mr. Associate Justice Roberts: Did they sustain you in the ejectment suit?

Mr. Porrata: Yes, sir.

Mr. Associate Justice Roberts: And left you in possession?

Mr. Porrata: Yes.

Mr. Associate Justice Roberts: Then when the other party turned about and started to enforce his option—or you wanted to enforce the option——

Mr. Porrata (interposing): Yes.

Mr. Associate Justice Roberts (continuing) ——they held that there was a defense against that?

Mr. Porrata: Yes; that knowledge——

Mr. Associate Justice Roberts (interposing): Because the mortgage notes did not have any reference to the option?

Mr. Porrata: Exactly.

Mr. Associate Justice Roberts: And they said the man who dealt with the notes knew?

Mr. Porrata: Yes. If you take that case according to jurisprudence, then good faith is unwritten law. If you take it to any court in the 'States, what will they say to you? If you take it to the Supreme Court in Puerto Rico, what? Look at the *Quintana* case (*Quintana* v. *Capital of Puerto Rico*, 51 P. R. R. 103). They were told there that the seller of the property was not the owner of the property, so he knew he was buying from somebody else—under that principle of law the Court told them they could not do what the Court let them do here.

You must excuse me, your Honors—we Latins do get sometimes very excited!

The Chief Justice: That is quite all right.

Mr. Porrata: That is why we say in our statement of points not that we want the Court to review the evidence because the finding of fact on the evidence was in our favor.

Mr. Associate Justice Frankfurter: How did the Supreme Court of Puerto Rico deal with this question of good faith?

Mr. Porrata: Unanimously held good faith is proper.

Mr. Associate Justice Frankfurter: Yes, but——

Mr. Associate Justice Roberts (interposing): They said the purchaser had a right to stand on the record no matter what he knew. That is what they held, is it?

Mr. Porrata: Yes, and we say the record informed him anyway.

Mr. Associate Justice Roberts: You say he had actual knowledge?

Mr. Porrata: We say he had actual knowledge and he had constructive knowledge, too, and he acquired all that information before.

Mr. Associate Justice Frankfurter: What did they do with the actual knowledge point?

Mr. Porrata: They find he had actual knowledge.

Mr. Associate Justice Frankfurter: They found that?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: And what legal conclusion did they draw from it?

Mr. Associate Justice Roberts: That it was not material.

Mr. Associate Justice Frankfurter: What did they say? Did they say anything about it?

Mr. Porrata: No.

Mr. Associate Justice Frankfurter: They found knowledge?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: Actual knowledge?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: Did they say anything about it?

Mr. Porrata: They did not touch it.

Mr. Associate Justice Frankfurter: They found knowledge of the fact but did not take account of it?

Mr. Porrata: Yes.

Now, in the ejectment case on the contrary they decided in our favor. That is why we say they committed error.

The brief of the respondent itself shows that you have to give us that concession and it shows that we have the right to go to the Circuit Court.

We lawyers are highly responsible for the decisions of the Court. We may cause the Court to render a decision in Ponce different from some law, as in this case.

Why they make a contract with us and why they deprive us of the right of that contract and why the Courts should

say we are right in the one case and wrong in the other case, which is the same, is beyond us. This looks like the method they use in Europe: make a treaty and if you don't like the treaty we shoot you.

Excuse me, again, please, my excitement.

That agreement between these people was a private law between the two people and anyone who knew about it should respect it. Everyone must know it. A private law must be respected if you know it.

That is why we want this case to be examined, your Honors.

Mr. Associate Justice Frankfurter: Is it your suggestion that this was a surprise decision like some made in this Court and the Supreme Court of Puerto Rico changed its law?

Mr. Porrata: Absolutely.

Mr. Associate Justice Frankfurter: So, when the decision came down they decided by a rule of law that you did not argue?

Mr. Porrata: You are right. Of course I cannot explain that.

Our reply brief contains all the decisions of the Courts and cites cases in England, Kentucky, Massachusetts—everywhere and the general principle that the courts won't let a man get away with the fruits of his fraud or bad faith.

Mr. Associate Justice Frankfurter: Did you apply for a re-hearing to the Supreme Court of Puerto Rico?

Mr. Porrata: We applied for a re-hearing but they were in vacation.

Mr. Associate Justice Frankfurter: Did you before the Circuit Court of Appeals raise the point that this was a surprise decision?

Mr. Porrata: Yes.

Mr. Associate Justice Black: What is the new point you say you were surprised with, or that they surprised you with?

Mr. Porrata: What?

Mr. Associate Justice Black: What is the new point they surprised you with?

Mr. Porrata: After finding that everyone knew of the option the surprise was this: they decided the case in our favor, and then —

Mr. Associate Justice Black (interposing) They decided something about bad faith?

Mr. Porrata: I say I was surprised when they let the man escape with the fruits of his bad faith.

Mr. Associate Justice Black: As I read the record, at page 486, they held there was no bad faith.

Mr. Porrata: What is that?

Mr. Associate Justice Black: At page 486 of the transcript of record, the Opinion of the Court, we find this:

> "The court comes to the conclusion that neither conspiracy nor fraud on the part of the defendants against the plaintiffs in these cases has been shown."

Mr. Porrata: There is one error: fraud is implied from knowledge.

Mr. Associate Justice Black: They then say:

> "Having reached the foregoing conclusions, the court deems it unnecessary to consider the other questions of law raised and discussed in the present cases by counsel for both sides",

and they approve the finding.

Mr. Porrata: There is the inescapable error of the Court of Puerto Rico in these cases.

Mr. Associate Justice Frankfurter: You contend that they are not purchasers in good faith.

Mr. Porrata: They did not purchase in good faith.

The whole matter of knowledge carries the implication of law.

Mr. Associate Justice Roberts: As I understand it, wherever there is a record system you are bound by the record.

Mr. Porrata: Yes.

Mr. Associate Justice: But you are also equitably bound by notice of the fact if it is not on record.

The Supreme Court of Puerto Rico said, in substance, "Never mind if he knew it. We are going to hold, from now on, in Puerto Rico, that a man who has knowledge of that and acts as though he had not the knowledge is acting lawfully."

Mr. Associate Justice Black: What you say is is that the Supreme Court of Puerto Rico held that.

Mr. Porrata: Yes.

Mr. Associate Justice Black: And you want us to say that they did not have a right to hold that?

Mr. Porrata: Yes. The holding is contrary—

Mr. Associate Justice Black (interposing) To what the Court held before?

Mr. Porrata: And to all the laws of equitable jurisdictions.

Mr. Associate Justice Black: And is it contrary to the statutes?

Mr. Porrata: Yes, it is, the statute of good faith; that is unwritten.

Mr. Associate Justice Black: What statute?

Mr. Porrata: That no one can escape free who is guilty of bad faith.

Mr. Associate Justice Black: Where is that in the brief?

Mr. Porrata: That we are not going to hold a decision is correct where someone is guilty of bad faith.

The Supreme Court of Puerto Rico made a mistake; that is all.

I am sure the Supreme Court is not satisfied with that decision.

(Thereupon the oral argument in the instant case was concluded.)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 497.

MARIO MERCADO E HIJOS, *Petitioner,*

v.

ELVIRA OLIVIERI COMMINS, ET AL., *Respondents.*

ORAL ARGUMENT BY PEDRO M. PORRATA ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FIRST CIRCUIT.*

WILLIAM CATTRON RIGBY,
PEDRO M. PORRATA,
Attorneys for Petitioner.

RIGBY, LEON and WEILL,
FRED W. LLEWELLYN,
Of Counsel.

* Reported by H. S. Middlemiss, Columbian Bldg., Washington, D. C., and as revised by counsel.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

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Washington, D. C.,
April 24, 1944.

The above-entitled cause was argued in The Supreme Court of the United States, commencing at 3:28 o'clock p. m. on Monday, April 24, 1944.

Before:

HONORABLE HARLAN F. STONE, the Chief Justice; and
HONORABLE OWEN J. ROBERTS;
HONORABLE HUGO L. BLACK;

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* Reported by H. S. Middlemiss, Columbian Bldg., Washington, D. C., and as revised by counsel.

HONORABLE STANLEY F. REED;
HONORABLE FELIX FRANKFURTER;
HONORABLE WILLIAM O. DOUGLAS;
HONORABLE FRANK MURPHY;
HONORABLE ROBERT H. JACKSON; and
HONORABLE WILEY RUTLEDGE, Associate Justices, there being

Present:

On behalf of the Petitioner:

WILLIAM CATTRON RIGBY, FRED W. LLEWELLYN, and PEDRO M. PORRATA, ESQUIRES; and

On behalf of the Respondent:

(The case was submitted without oral argument for the Respondent.)

Thereupon the following proceedings were had and oral arguments made:

PROCEEDINGS AND ORAL ARGUMENTS

The Chief Justice: Case No. 497.

The Clerk of the Court: Counsel for the petitioner are present.

The case is submitted for the respondent.

The Chief Justice: Proceed, please.

ORAL ARGUMENT ON BEHALF OF THE PETITIONER

By Pedro M. Porrata

MAY IT PLEASE THE COURT: From the decision of the Circuit Court of Appeals in the De Castro case, it can be easily gathered that Rule 39-B did not arise from judicial necessity or any other legal justification but only on account of continuous reversals of judgments of that court by this Supreme Court. The Circuit Court says so in

the opinion in that De Castro case. Said opinion shows, therefore, that the Circuit Court is not in position, because of its mental attitude, to give due regard to the right of appeal granted by Congress to the Puerto Rican people. It was because the Circuit Court interpreted these reversals as amounting to a declaration that there was no use of entertaining appeals from Puerto Rico, that Rule 39-B was adopted.

That was the reason for the adoption of Rule 39-B and that is why, in the mind of the Circuit Court below, Rule 39-B works as a mathematical formula instead of as a legal formula: When an appeal from Puerto Rico reaches the Circuit Court the Rule as interpreted under the circumstances prejudices the case of the appellant from the very start.

When Congress gave Puerto Rican litigants the right to appeal to the Circuit Court—and no Court has the right to nullify the will of Congress—it established a jurisdictional amount or the existence of a Federal question as the sole ground for taking the appeal. Who can take that right away from us except Congress? That is the question. Or, who can legally prejudice that right in any way by adding or detracting?

The way we understand the doctrine laid down by this Supreme Court in regard to the respect to be accorded decisions of local courts in local matters, is as follows:

The appeal court must take the case under consideration; look into the facts and the law applicable; and, after making an examination of it from every reasonable angle, if the court reaches the conclusion that the opinion below is not unreasonable, illogical, contrary to sound judicial reasoning or otherwise unsustainable, the judgment below is allowed to stand even though the appeal court may have a different opinion. That is: on the examination of the case, comparison and distinguishing

of facts, the appeal court gets into the merits of the opinion for the purpose of determining that there is nothing making the reversal of the judgment below necessary.

Take our case, for example:

We sustained here that the Supreme Court of Puerto Rico reached a conclusion of fact which, under the constant jurisprudence of the Supreme Court of Spain, of Puerto Rico itself, of all the courts, of the states of the Union and of the English Court of Chancery, required that court to decide the case in favor of Petitioner, and, therefore, that the judgment appealed from, should not be allowed to stand by this Court in the exercise of its jurisdiction to review.

Here we have a case of a person having notice that another person had an option to realty. The Supreme Court of Puerto Rico found that Respondents had notice, and that they deliberately violated the option; yet, after making that finding, held in favor of the mala fide purchaser; an error as patent as ever committed by courts.

In our brief, especially in our last reply brief, we cited cases from the same Supreme Court of Puerto Rico, following, as a matter of fact, decisions of the Supreme Court of Spain, which clearly indicate that, upon the facts of our case, Petitioner is entitled to a decision in its favor.

We showed therein that under the decisions of the Spanish Supreme Court, interpreting the same provisions of our code involved in this case, no mala fide purchaser is ever allowed to escape with the fruits of his mala fide conduct. We showed by decisions of the Court of Chancery in England also that no mala fide purchaser has been allowed, under the English law, to escape with the fruit of his expressed or implied malice. Shall we say that the Supreme Court of Puerto Rico has any reason for rendering a decision contrary to those unquestionable

principles of civilized law? Its judgment in this case contrary to those principles, must be understood as obviously erroneous; for if the decision of the Supreme Court of Puerto Rico in this case goes against the decisions of courts in the United States, to the decisions of the Supreme Court of Spain, to the decisions of the Supreme Court of Puerto Rico itself, the people of Puerto Rico are entitled to have that decision reversed as being clearly against the overwhelming understanding of the courts in all jurisdictions to which we have the right to appeal for help in the interpretation of our laws. There is no ground in the opinion below to justify the allegation that the Supreme Court of Puerto Rico merely intended to change the law of the Island. It simply went wrong in the application of the law to the facts, as clearly indicated by the decisions cited. If it be argued, though nothing is said in the opinion, that a change of the law is contemplated, that was to be done by the legislature and not by our Supreme Court, which should be understood in this case as merely having committed an error deserving of a complete reversal of the judgment. The legislature is the only one with power to abolish the requirement of good faith in dealings between human beings.

Now, there is no mystery in the principle involved in regard to the respect to be accorded to decisions of local courts on local matters. The doctrine which accords respect to findings of lower courts on appeal, is similar in nature; appeal courts will not reverse findings of lower courts unless there is some justification. When is it that there is such justification? Well, in some cases, the logical processes that the mind naturally undertakes to reach a conclusion are wanting; in others, the findings are against the overwhelming weight of the evidence; in others, the finding is unreasonable or arbitrary; in others, unwarranted, etc.; and, therefore, the findings are reversed.

Appeal courts do not simply close their eyes and say that they are just not going to review the findings of the Court below. No; they have to reason out the situation offered for review; for the discovery of the presence of an error in a case, sometimes required a great deal of examination, distinguishing and comparison. No mathematical formula is used in regard to the review of findings as well as no mathematical formula as represented by Rule 39-B should be allowed, and no prejudice should be enhanced in the review of decisions by United States Courts in cases arising from Puerto Rico. The granting of that power to review, in a sense, is a political question that no court has the power to interfere with, to amend or modify. Congress and the President know why the right to review was created.

Whenever a mental attitude precedes or follows the establishment of a rule as Rule 39-B in relation to appeals, we have something dangerous to the administration of justice; for then the formula is not applied with judicial significance after examination and comparison without prejudice of the question involved. It is applied under the impression that the appeal should be denied and that the judgment of the Supreme Court below is to be considered as practically unappealable.

Coming, again, back to this case: We see that the Supreme Court of Puerto Rico mentioned certain sections of our code and provisions of the Mortgage Law. We, however, sustain that none of the statutes mentioned by the court below are involved in this controversy.

What is then involved in this case? According to the judgment of Petitioner, a statute written nowhere, a law which in the United States, in Spain, in Puerto Rico, in England and everywhere, where civilized law governs, provides that no mala fide purchaser will be allowed by a court to escape with the fruits of his misconduct. We will

call the attention of your Honors, again, in relation to this principle, to the findings of the court below. It shows implicitly where it is that the Insular Court decided absolutely contrary to a principle recognized everywhere in our jurisdiction.

In the application of Rule 39-B, your Honors, we must distinguish between certain principles of law, as the one involved in this case, which are the same everywhere in the world and the principles of purely local law of the Island of Puerto Rico; for it is clear that this Supreme Court of the United States here has as much justification and ability to deal with general principles of logic and law as we have in Puerto Rico. When the question involved in any particular case is not any matter purely of local law but a matter of principle or of public policy, are we going to say that here in this Supreme Court the principle will have a different meaning than it does for every logical thinking community anywhere on earth? I do not think so. The Supreme Court of Puerto Rico may, as any other court, go wrong in the application or non-application of an applicable principle. We will read the finding of the court below in the instant and the ejectment case (the *ejectment case* is part of this proceeding as shown by the opinion of the court below).

In the instant case, we filed an action to exercise the option. While our action was pending, Respondents filed an ejectment action against the partnership, which was tried in the District Court of Ponce and decided in favor of the partnership. Appeal was taken to the Supreme Court of Puerto Rico which sustained the decision of the District Court in our favor making the following finding of facts:

> "We do not wish to reach any conclusions in this case which might affect the decision of the questions on their merits, but we do state that the evidence of

> the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, * * * that they knew that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option."

Mr. Associate Justice Black: What page of the record is this ejectment suit referred to and is this quotation to be found?

Mr. Porrata: That quotation is from the opinion in the ejectment suit. 55 D. P. R. 43.

That is cited in our brief. The Supreme Court of Puerto Rico in the opinion refers to the ejectment case.

Mr. Associate Justice Roberts: What was this case? This was a case to enforce an option, was it?

Mr. Porrata: Yes.

Mr. Associate Justice Roberts: Did they sustain you in the ejectment suit?

Mr. Porrata: Yes, sir.

Mr. Associate Justice Roberts: And left you in possession?

Mr. Porrata: Yes.

Mr. Associate Justice Roberts: Then when the other party turned about and started to enforce his option—or you wanted to enforce the option——

Mr. Porrata (interposing): Yes.

Mr. Associate Justice Roberts (continuing): —they held that there was a defense against that?

Mr. Porrata: Yes; that knowledge——

Mr. Associate Justice Roberts (interposing): Because the mortgage notes did not have any reference to the option?

Mr. Porrata: Exactly, Sir.

Mr. Associate Justice Roberts: And they said the man who dealt with the notes knew?

Mr. Porrata: Yes. If we take the finding in the ejectment case and the instant case, and judge it according to applicable principles in regard to the unwritten law which requires good faith in human dealings, the case must be decided in our favor. If we take this case to any court in the States, what will it say on the face of the findings? If we take it and judge it according to *Quintana* v. *Capital of Puerto Rico*, 51 D. P. R. 103, the purchaser was told therein that the seller was not the owner of the property. Quintana lost, irrespective of everything else, *because of the existence of notice and knowledge.*

That is why we say in our statement of points, not that we wanted the Court to review the evidence, because the finding of fact on the evidence was in our favor, but that we wanted the Court to carry the finding to its natural legal conclusion.

Mr. Associate Justice Frankfurter: How did the Supreme Court of Puerto Rico deal with this question of good faith?

Mr. Porrata: Held for the mala fide buyer.

Mr. Associate Justice Frankfurter: Yes, but——

Mr. Associate Justice Roberts (interposing): They said the purchaser had a right to stand on the record no matter what he knew. That is what they held, is it?

Mr. Porrata: Yes, and we say the record informed him anyway.

Mr. Associate Justice Roberts: You say he had actual knowledge?

Mr. Porrata: We say he had actual knowledge and he had constructive knowledge, too, and he acquired all that information before he bought the property.

Mr. Associate Justice Frankfurter: What did they do with the actual knowledge point?

Mr. Porrata: They find he had actual knowledge.

Mr. Associate Justice Frankfurter: They found that?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: And what legal conclusion did they draw from it?

Mr. Associate Justice Roberts: That it was not material.

Mr. Associate Justice Frankfurter: What did they say? Did they say anything about it?

Mr. Porrata: No.

Mr. Associate Justice Frankfurter: They found knowledge?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: Actual acknowledge?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: Did they say anything about it?

Mr. Porrata: They did not touch it.

Mr. Associate Justice Frankfurter: They found knowledge of the fact but did not take account of it?

Mr. Porrata: Yes.

Now, in the ejectment case, on the contrary, as is stated before, they decided in our favor. In departing from the principle which controlled the decision in that case, the court below committed plain and patent error.

Respondents' brief itself goes merely on prejudice and shows that Petitioner should be allowed to prevail in this court. In regard to the way this case is treated in that brief, may we call the attention of Respondents to the fact that we lawyers sometimes are highly responsible for the decisions of courts, and that it is an act highly reproachable to try to win by awakening prejudice against a party or to go out of the record into an unwarranted exhibition of passion.

Don Elvira simply made the contract when she needed a loan in 1932. The economical situation then was bad. Measures taken in Washington in 1933 to release the nation from trouble, changed the situation. In 1936, the Lluveras people, who did nothing for Dona Elvira in 1932, when she needed help, now that the economic situation was better, induced her to break the contract. Because the partnership protests and tries to enforce the option, Respondents treat it unfairly in their brief. This looks like the method they follow in Europe: Make a contract; then break it; and if the injured party does not like the infringement, the whole matter is settled by shooting.

The agreement between Dona Elvira and the partnership amounts to private contractual law between two persons. Anybody who knew of it was bound to respect it, especially it being in relation to land. In regard to public laws, whether civil or criminal, all persons are presumed conclusively to know of them. A private law must be also respected and abided by everybody who knows of its existence.

That is why we want this case to be examined, your Honors; and to be decided according to the real principle of law applicable.

Mr. Associate Justice Frankfurter: Is it your suggestion that this was a surprise decision like some made in this Court and the Supreme Court of Puerto Rico changed its law?

Mr. Porrata: Absolutely. That the Court below committed plain error.

Mr. Associate Justice Frankfurter: So, when the decision came down they decided by a rule of law that you did not argue?

Mr. Porrata: You are right, Sir. Of course I cannot explain that. The court went off the really applicable law.

Our reply brief contains all the decisions of the Courts and cites cases in England, Kentucky, Massachusetts—everywhere and the general principle that the courts will not let a man get away with the fruits of his fraud or bad faith.

Mr. Associate Justice Frankfurter: Did you apply for a re-hearing to the Supreme Court of Puerto Rico?

Mr. Porrata: We applied for a re-hearing but they were in vacation. Therefore, we appealed.

Mr. Associate Justice Frankfurter: Did you before the Circuit Court of Appeals raise the point that this was a surprise decision?

Mr. Porrata: Yes, that it was against law.

Mr. Associate Justice Black: What is the new point you say you were surprised with, or that they surprised you with?

Mr. Porrata: What, Sir, I am sorry——

Mr. Associate Justice Black: What is the new point they surprised you with?

Mr. Porrata: After finding that everyone knew of the option the surprise was this: they decided the ejectment case in our favor, and then——

Mr. Associate Justice Black (interposing): They decided something about bad faith?

Mr. Porrata: I say we were surprised when they let Respondents escape with the fruits of their bad faith in this case; such ruling being against law.

Mr. Associate Justice Black: As I read the record, at page 486, they held there was no bad faith.

Mr. Porrata: Where is that, Sir?

Mr. Associate Justice Black: At page 486 of the transcript of record, the Opinion of the Court, we find this:

> "The court comes to the conclusion that neither conspiracy nor fraud on the part of the defendants against the plaintiffs in these cases has been shown."

Mr. Porrata: There is the inescapable error: fraud is implied from knowledge. The court found they knew and acted deliberately.

Mr. Associate Justice Black: They then say:

> "Having reached the foregoing conclusions, the court deems it unnecessary to consider the other questions of law raised and discussed in the present cases by counsel for both sides",

and they approve the finding.

Mr. Porrata: There is the inescapable error of the Court of Puerto Rico in this case: *fraud is implied from notice.*

Mr. Associate Justice Frankfurter: You contend that they are not purchasers in good faith.

Mr. Porrata: They did not purchase in good faith. The whole matter of knowledge carries the implication of fraud.

Mr. Associate Justice Roberts: As I understand it, wherever there is a record system you are bound by the record.

Mr. Porrata: Yes.

Mr. Associate Justice : But you are also equitably bound by notice of the fact if it is not on record.

Mr. Associate Justice Black: The Supreme Court of Puerto Rico said, in substance, "Never mind if he knew it. We are going to hold, from now on, in Puerto Rico, that a man who has knowledge of that and acts as though he had not the knowledge is acting lawfully".

What you say is that the Supreme Court of Puerto Rico held that.

Mr. Porrata: Yes, but that it was wrong in not applying the real law to this case.

Mr. Associate Justice Black: And you want us to say that they did not have a right to hold that?

Mr. Porrata: Yes. The holding is contrary to law.

Mr. Associate Justice Black (interposing): To what the Court held before?

Mr. Porrata: And to all principles of law and equity to which we are entitled to look for in our jurisdiction.

Mr. Associate Justice Black: And is it contrary to the statutes?

Mr. Porrata: Yes, it is, the statute of good faith; that is the unwritten law which requires good faith in human dealings as a matter of public policy.

Mr. Associate Justice Black: What statute?

Mr. Porrata: That no one can escape with the fruits of bad faith.

Mr. Associate Justice Black: Where is that in the brief?

Mr. Porrata: Everywhere; it is the backbone of our theory, that no court should allow the wrongdoer to escape with the fruits of his wrong. To hold as the Court did is bad law everywhere; obviously so.

The Supreme Court of Puerto Rico committed patent error, that is all.

I am sure that this Supreme Court cannot be satisfied with that decision.

(Thereupon the oral argument in the instant case was concluded.)

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 497.—October Term, 1943.

Mario Mercado e Hijos, Petitioner,
vs.
Elvira Olivieri Commins, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 29, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Rule 39(b) of the Court of Appeals for the First Circuit, effective September 20, 1940, authorizes the summary dismissal or affirmance of judgments appealed from the Supreme Court of Puerto Rico involving only questions of local law, unless it appears from the record and appellant's required "statement on appeal" that the judgment appealed from "is 'inescapably wrong' or 'patently erroneous' (*Sancho Bonet* v. *Texas Co.*, 308 U. S. 463 (1940))". In this, as in the companion case, *DeCastro* v. *Board of Commrs. of San Juan*, No. 349, decided this day, we granted certiorari on a petition raising important questions concerning the appellate review by federal courts of decisions of the Supreme Court of Puerto Rico in matters of local concern. The petition here presents for decision the question (1) whether the application of Rule 39(b) involves an abdication of the duty of the Court of Appeals to hear and decide such appeals on the merits, on brief and argument, as are other appeals; and (2) whether the decision of the Insular Supreme Court of Puerto Rico is so manifestly correct as to make any appeal from it necessarily frivolous and thus warrant dismissal of the appeal without a hearing, on mere inspection of the face of the record.

Petitioner, an agricultural partnership, by petition in the insular District Court of Ponce, P. R., sought rescission of a sale of a plantation known as "Indios", made by respondent Commins to others of the respondents, as in violation and in fraud of an option to purchase the property given by respondent Commins to petitioner. After a trial, the District Court made findings of fact on the basis of which it gave judgment for respondents. The Su-

preme Court of Puerto Rico confirmed the findings of the District Court and affirmed the judgment. 60 D. P. R. 877 (Spanish edition). On appeal to the Court of Appeals for the First Circuit under 28 U. S. C. § 225(a), that court, on consideration of the typewritten record and appellant's statement on appeal, and without hearing argument and without an opinion, affirmed under its Rule 39(b).

The District Court and the Supreme Court both found the facts as follows: In 1922 respondent procured a loan from petitioner of more than $40,000, for which respondent Commins gave petitioner four promissory notes payable to "the holder by endorsement", secured by a mortgage, not specifically naming any mortgagee, on respondent Commins' undivided interest in two plantations, "Indios" and "Juanita", then owned jointly by her and her sister. At that time petitioner was a tenant of both plantations under lease, that of "Indios" expiring in 1937, that of "Juanita" in 1938. The mortgage contract stipulated that Mrs. Commins upon three months written notice might at any time before maturity pay the mortgage credits. It also provided that "the debtor, as a part of the consideration of this contract agrees with the partnership Mario Mercado e Hijos, so long as the mortgage credit herein constituted is not paid, to grant it priority to purchase and sell or lease her undivided joint interest in the estates 'Indios' and 'Juanita' upon the same price and terms" as those on which she should be willing to sell or lease to any other purchaser or lessee. It further provided "to this effect the debtor shall advise, unless such mortgage credit is paid . . . of any offer of sale or lease made to her".

The following year, 1933, petitioner sold the promissory notes to the heirs of Jose Tous Soto, the transfer being effected by delivery of the notes and by a deed executed by petitioner which purported to assign to the heirs the "mortgage credits" and guaranteed payment in monthly installments of the stipulated interest of 9% due on the notes less ¾ of 1%, which it was agreed petitioner should retain for itself. No mention was made in the deed of the option secured to petitioner by the mortgage contract but both of the insular courts made findings which petitioner contends establish that the option was not intended to be

assigned, but that the rights under it were to be retained by petitioner. Three years later, in 1936, the interests of the owners in the two estates were partitioned between Mrs. Commins and her sister, Mrs. Commins receiving the plantation "Indios" by the partition deed in which petitioner joined for the purpose of consenting to the partition. The trial court made findings which can be interpreted as meaning that all the respondents were in fact aware that it was the understanding of petitioner and the transferees of the mortgage creditors that the option was to remain the property of petitioner.

In February, 1937, Mrs. Commins gave a new short term mortgage for $45,000 on "Indios" planation to respondent Manuel Francisco Lluberas Passarell. The proceeds, to the extent of $41,000, were by her direction used to pay her mortgage indebtedness, with three months interest in advance, to the heirs of Jose Tous Soto, the transferees of the mortgage credits, who, on receipt of the payment, cancelled the mortgage. Immediately following the cancellation Mrs. Commins sold and conveyed by deed the estate "Indios" to respondent Lluberas Passarell and his sisters, who are also respondents. It is this deed which petitioner seeks to cancel as in violation of the option.

In affirming the judgment of the Ponce District Court which denied the petition for cancellation of the conveyance, the Supreme Court of Puerto Rico rested its decision on two independent grounds, either one of which, if supportable, is sufficient to sustain it. Construing and applying the relevant provisions of Art. 152 of the Puerto Rico mortgage law and §§ 1418 and 1759 of the Civil Code of Puerto Rico, 1931 edition,[1] it concluded that the transfer by petitioner of the mortgage credits to the heirs of Jose

[1] Article 152 of the Puerto Rico Mortgage Law provides:

"A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry.

"The debtor shall not be bound by said contract to any further extent than he was by his own.

"The assignee shall be subrogated to all the rights of the assignor."

Section 1418 of the Civil Code of Puerto Rico provides:

"The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge, or privilege."

Section 1759 of the Civil Code of Puerto Rico provides in part:

"The pledge and the mortgage are indivisible, even if the debt should be divided among the legal representatives of the debtor or of the creditor.

"Therefore, an heir of the debtor who may have paid a part of the debt

Tous Soto without reservation of the option to purchase, "conveyed" to the heirs, petitioner's rights under the option as an inseparable incident of the credits so that after the transfer petitioner was not entitled to exercise the option. It also concluded that since the option was for "so long as the mortgage credit here constituted is not paid" it became "extinguished" by virtue of the payment of the mortgage and could not thereafter be exercised. It further held that petitioner had failed to prove that the sale of "Indios" by respondent Commins, after the assignment by petitioner of the mortgage credits, and after the payment of the mortgage and the expiration of the option, was in fraud of petitioner's rights under the option.

The court did not pass upon the contention that the option to purchase was void as an agreement "enabling the mortgagee to adjudicate to itself the mortgage property" comparable to agreements for collateral advantage "clogging" the equity of redemption, deemed unlawful in Anglo-American mortgage law. *Jennings* v. *Ward*, 2 Vern. 520; *Samuel* v. *Jarrah Timber and Wood Paving Corp., Ltd.*, L. R. [1904] A. C. 323; 21 Harv. L. Rev. 458. But assuming the validity of the option, as did the Supreme Court of Puerto Rico, its view that rights acquired by a mortagee as an incident to the mortgage debt passes to the transferee of the debt by assignment, whether mentioned in the assignment or not, is not unknown to our law. Cf. *Sheldon* v. *Sill*, 8 How. 441, 450; *Batesville Institute* v. *Kauffman*, 18 Wall. 151, 154; Jones on Mortgages, § 1033; and see *North British & Mercantile Ins. Co.* v. *Rose*, 228 Fed. 290, 292. And it is a familiar rule of our law that save in exceptional circumstances not present here an option can only be exercised in conformity to its terms and never after the time fixed for its expiration. *Waterman* v. *Banks*, 144 U. S. 394, 401-3; *Kelsey* v. *Crowther*, 162 U. S. 404, 409; *Lord Ranelagh* v. *Melton*, 2 Drewry and Smale, 278.

Petitioner has furnished us with no persuasive evidence that the law is otherwise in Puerto Rico. On the contrary the Puerto Rican Supreme Court's decision that the option was necessarily assigned with the mortgage is not without support in the statu-

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can not request that the pledge or mortgage be proportionately extinguished as long as the debt has not been paid in full.

"Neither can the heir of the creditor, who received his part of the debt, return the pledge nor cancel the mortgage to the prejudice of the other heirs who have not been paid."

tory provisions which it cited, and to which we have referred.[2] Whether the option was so transferred or not it is difficult to see upon what legal theory any system of law could in the circumstances of this case read into an option to purchase, a term prolonging the period specified for its exercise. Petitioner has advanced no such theory and cites no authority which would support it.

As we have said in the *de Castro* case, the duty of the Court of Appeals and of this Court to examine and appraise local law in cases brought for review from the insular courts cannot ordinarily be discharged summarily. But full argument in this case has not developed any issue of Puerto Rican law, or any question of the deference rightly to be paid to the decisions of the highest court of Puerto Rico, so substantial as to preclude the summary disposition made of this case by the Court of Appeals.

Affirmed.

[2] As the Puerto Rican Supreme Court pointed out, the option here could properly be regarded as "an accessory right" or "privilege", within the meaning of § 1418 of the Civil Code, quoted *supra* note 1. See Manresa, Commentaries on the Civil Code, Vol. 10, pp. 402-9.